

No. 16052

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United States  
Court of Appeals  
for the Ninth Circuit

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APACHE POWDER COMPANY, a corporation,  
Appellant,

VS.

THE ASHTON COMPANY, INC., CONTRAC-  
TORS AND ENGINEERS, formerly Ashton  
Building Company and MARDIAN CON-  
STRUCTION COMPANY, corporations en-  
gaged in a joint venture as Ashton-Mardian  
Company and THE TRAVELERS INDEM-  
NITY COMPANY, a corporation,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Arizona

FILED

AUG - 4 1958

PAUL P. DERRIN, CLERK



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United States  
Court of Appeals  
for the Ninth Circuit

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Appellant,

vs.

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Appeal from the United States District Court  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

EVANS, KITCHEL & JENCKES,  
807 Title & Trust Building,  
Phoenix, Arizona,

Attorneys for Appellant.

HALL, CATLIN & MOLLOY,  
1010 Valley National Building,  
Tucson, Arizona,

CONNER & JONES,  
Valley National Building,  
Tucson, Arizona,

Attorneys for Appellees.





In The United States District Court  
For The District of Arizona

Civil Action No. 967 Tucson

UNITED STATES OF AMERICA, for the Use  
of APACHE POWDER COMPANY, a corporation,  
Plaintiff,

v.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, formerly ASHTON BUILDING COMPANY, and MARDIAN CONSTRUCTION COMPANY, corporation engaged in Joint Venture as ASHTON-MARDIAN COMPANY; THE TRAVELERS INDEMNITY COMPANY, a corporation; PIONEER CONSTRUCTORS, a corporation; and CONSTRUCTION MATERIALS COMPANY, a corporation,  
Defendants.

COMPLAINT

The United States of America, suing herein for the use and benefit of Apache Powder Company, a corporation, alleges:

I.

This action is brought under the Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b, on the payment bond of the contractor under a contract with the United States of America which was to be and was performed and executed within the District of Arizona.

## II.

Apache Powder Company is a New Jersey corporation, authorized to do business in the State of Arizona. The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company are Arizona corporations engaged in a Joint Venture as Ashton-Mardian Company. The Travelers Indemnity Company is a Connecticut corporation, authorized to do business in the State of Arizona. Pioneer Constructors and Construction Materials Company are Arizona corporations.

## III.

On or about March 30, 1956, the defendants, The Ashton Company, Inc., Contractors and Engineers, as Ashton Building Company, and Mardian Construction Company, engaged in a Joint Venture as Ashton-Mardian Company, duly entered into a contract in writing with the United States of America, Corps of Engineers, United States Army, wherein and whereby it was agreed that said defendants were to furnish the material and perform the work for the construction and completion of Air Force Station TM-181, a radar station five miles North of Ajo, Pima County, State of Arizona, in accordance with plans and specifications and terms and conditions, therein specifically set forth, in consideration whereof the United States of America agreed to pay said defendants the sum of Two Million Three Hundred Fifty-one Thousand Six Hundred Thirty-seven and no/100ths Dollars (\$2,351,637.00).

IV.

On or about March 30, 1956, pursuant to the Act of Congress of August 24, 1935, c. 642, § 1, 49 Stat. 793, 40 U.S.C.A. § 270a, and pursuant to the terms of the aforesaid contract, said Ashton-Mardian Company, a Joint Venture, as principal, and defendant The Travelers Indemnity Company, as surety, for a valuable consideration, made, executed, and delivered to the United States of America their Payment Bond in the sum of Nine Hundred Forty Thousand Six Hundred Fifty-five and 04/100ths Dollars (\$940,655.04), the condition of which bond, as required by the said Act of Congress, is that the said principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided in said contract.

V.

On or about March 30, 1956, said Ashton-Mardian Company, a Joint Venture, as the prime contractor under said contract with the United States of America, entered into a subcontract with defendant Pioneer Constructors for the performance and completion of certain parts of the work, specified in said subcontract, which were to be performed and completed under said contract with the United States of America, in accordance with the plans and specifications and terms and conditions of said prime contract, in consideration whereof said prime contractor agreed to pay to said defendant Pioneer Constructors the sum of Four Hundred One Thousand Two Hundred Seventeen and 83/100ths Dollars (\$401,217.83).

## VI.

Upon information and belief, the said Ashton-Mardian Company, as the prime contractor, and defendant Pioneer Constructors, as a subcontractor, under said contract with the United States of America, entered upon the performance of said prime contract and subcontract and furnished labor and material therefor, but, without any notice to Apache Powder Company by any of the defendants and without any knowledge thereof by Apache Powder Company, said subcontract with defendant Pioneer Constructors was terminated on or about November 1, 1956.

## VII.

That, without any notice to Apache Powder Company by any of the defendants and without any knowledge thereof by Apache Powder Company, on or about November 1, 1956, said Ashton-Mardian Company, a Joint Venture, as the prime contractor under said contract with the United States of America, entered into a subcontract with defendant Construction Materials Company for the performance and completion of certain parts of the work, specified in said subcontract, which were to be performed and completed under said contract with the United States of America, in accordance with the plans and specifications and terms and conditions of said prime contract, in consideration whereof said prime contractor agreed to pay to said defendant Construction Material Company the sum of Two Hundred Sixty-six Thousand Three Hundred Ninety-one and 66/100 Dollars (\$266,391.66).



VIII.

Upon information and belief, the work to be performed under said subcontract of November 1, 1956, by defendant Construction Materials Company, was identical with the work to be performed under said subcontract of March 30, 1956, by defendant Pioneer Constructors, and said two subcontracts were in fact one and the same subcontract, part of which was performed and completed by defendant Pioneer Constructors and the remainder of which was performed and completed by defendant Construction Materials Company.

IX.

That from and including June 13, 1956, to and including March 12, 1957, on an open account at the special instance and request of defendants Pioneer Constructors and Construction Materials Company, Apache Powder Company, being then informed and believing that Construction Materials Company was a division of Pioneer Constructors, and having reason to believe it was furnishing all of said material to Pioneer Constructors under said subcontract of March 30, 1956, furnished material consisting of explosives and blasting supplies to Pioneer Constructors and Construction Materials Company for use in the prosecution of the work under said subcontracts and said prime contract with the United States of America, of the agreed and reasonable value of Thirty-three Thousand Four Hundred Fifty-three and 71/100ths Dollars (\$33,453.71), which material was delivered by

Apache Powder Company on said radar station job and was used by defendants Pioneer Constructors and Construction Materials Company in the prosecution of the work under said subcontracts and said prime contract with the United States of America.

### X.

There remains due, owing, and unpaid to Apache Powder Company from defendants Pioneer Constructors and Construction Materials Company, after all payments and credits have been allowed, upon said material furnished, delivered, and used as aforesaid, the sum of Twenty Thousand Nine Hundred and 69/100ths Dollars (\$20,900.69), no part of which sum has been paid, although payment thereof has been duly demanded.

### XI.

The last of said material was furnished and delivered by Apache Powder Company on or about March 12, 1957, and, pursuant to the Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b, and within ninety (90) days from the date on which the last of said material was furnished and delivered, to-wit, on April 25, 1957, Apache Powder Company gave written notice to Ashton Building Company, Mardian Construction Company, and Ashton-Mardian Company, a Joint Venture, the prime contractor under said contract with the United States of America, stating with substantial accuracy the balance due and amount claimed by Apache Powder Company and

the names of the parties to whom the material was furnished, which notice was served in the manner required by said Act of Congress.

XII.

Upon information and belief, defendant Construction Materials Company and said Ashton-Mardian Company, continued to perform said sub-contract and said prime contract with the United States of America, and performance thereof has been completed, but final settlement of said contract with the United States of America has not been made.

XIII.

That a period of ninety (90) days after the day on which the last of said material was furnished and delivered has expired, and that one (1) year after the date of final settlement of said contract with the United States of America has not expired.

Wherefore, the United States of America, on behalf and to the use of Apache Powder Company, prays judgment against said defendants for the sum of Twenty Thousand Nine Hundred and 69/100ths Dollars (\$20,900.69) with interest, for costs of suit herein incurred, and for such other and further relief as the Court may deem just and proper.

EVANS, KITCHEL & JENCKES,

/s/ By ALFRED B. CARR,

Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS THE ASHTON  
COMPANY, INC., CONTRACTORS AND  
ENGINEERS, formerly ASHTON BUILD-  
ING COMPANY, and MARDIAN CON-  
STRUCTION COMPANY, corporations en-  
gaged in Joint Venture as ASHTON-MAR-  
DIAN COMPANY

Comes now the defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and in answer to plaintiff's complaint filed herein, admit, deny and allege as follows:

I.

Admit the allegations contained in paragraphs I, II, III, IV and V of plaintiff's complaint.

II.

In answer to Paragraph VI of plaintiff's complaint, admit the allegations set forth in paragraph VI of plaintiff's complaint except the allegation that the plaintiff was not notified and had no knowledge as to the termination of said subcontract and as to those allegations, the defendants allege that they have no knowledge or information sufficient to form a belief as to the truth thereof and therefore deny the same.

III.

Admit the allegations set forth in paragraph VII of plaintiff's complaint except the allegation



that the plaintiff was without notice or knowledge of the contract referred to in said paragraph and as to those allegations, the defendants allege that they have no knowledge or information sufficient to form a belief as to the truth thereof and therefore deny the same.

#### IV.

In answer to paragraph VIII of plaintiff's complaint, admit that the work to be performed under the subcontract to the defendant Construction Materials Company was included in the prime subcontract with the defendant Pioneer Constructors, which work was not completed prior to the termination of the Pioneer Constructors' subcontract; deny that said subcontracts were one and the same and deny that the work called for in the Construction Materials Company's subcontract has been completed.

#### V.

In answer to paragraph IX and X of plaintiff's complaint, allege that they have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs IX and X of the complaint and therefore deny the same.

#### VI.

In answer to paragraph XI of plaintiff's complaint, admit that the plaintiff did send written notice to these defendants of plaintiff's claim, as in said paragraph alleged. These defendants allege, however, that they have no knowledge or information sufficient to form a belief as to whether or not

said notice was received within ninety days from the date on which plaintiff furnished or supplied the last of the materials on which the claim is based and therefore denies this portion of paragraph XI.

#### VII.

In answer to paragraph XII of plaintiff's complaint, admit that the defendant Construction Materials Company and these defendants continued to perform the subcontract of the defendant Construction Materials Company and the prime contract of these defendants with the United States of America, but deny that performance thereof has been completed and admit that final settlement of said contract with the United States of America has not been made.

#### VIII.

Admit the allegations contained in paragraph XIII of plaintiff's complaint.

Wherefore, these defendants pray that plaintiff take nothing by its complaint and for their costs herein expended.

HALL, CATLIN & MOLLOY,

/s/ By HAMILTON R. CATLIN,

Attorneys for defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company.

Notice of Mailing Attached.

[Endorsed]: Filed June 21, 1957.

In The District Court of the United States  
In and For The District of Arizona

No. Civ.—967 Tuc.

UNITED STATES OF AMERICA, for the Use  
of APACHE POWDER COMPANY, a corporation,  
Plaintiff,

vs.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, formerly ASHTON BUILDING COMPANY, and MARDIAN CONSTRUCTION COMPANY, corporations engaged in Joint Venture as ASHTON-MARDIAN COMPANY; THE TRAVELERS INDEMNITY COMPANY, a corporation; PIONEER CONSTRUCTORS, a corporation; and CONSTRUCTION MATERIALS COMPANY, a corporation,  
Defendants.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, an Arizona Corporation, and MARDIAN CONSTRUCTION COMPANY, an Arizona Corporation, dba ASHTON-MARDIAN COMPANY, a joint venture,  
Third Party Plaintiffs,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,  
Third Party Defendant.

## MOTION FOR MORE DEFINITE STATEMENT

Comes now the third party defendant, Hartford Accident and Indemnity Company, a corporation, and moves for a more definite statement of plaintiff's complaint in this, to-wit: that it furnish an account of the material alleged to have been furnished to Pioneer Constructors prior to November 1, 1956 and to defendant Construction Materials Company subsequent to said date for the reason that said materials, if any, were furnished under different contracts and under different bonds and that different defenses are available to this third party defendant in connection with materials furnished to defendant Pioneer Constructors than are available in connection with materials furnished to Construction Materials Company.

CONNER & JONES,

/s/ By A. O. JOHNSON,

Attorneys for Third Party  
Defendant.

### Memorandum of Points and Authorities

Rule 12 (e) provides for a more definite statement. It is respectfully submitted, that plaintiff's complaint in effect attempts to set up two separate causes of action, one against defendant Ashton-Mardian Company and defendant Pioneer Constructors and the other against Ashton-Mardian Company and Construction Materials Company, and third party defendant further submits that



different defenses are available on the two causes of action and therefore to properly plead the said complaint third party defendant should have this more definite statement.

CONNER & JONES,

/s/ By A. O. JOHNSON,

Attorneys for Third Party  
Defendant.

Notice of Mailing Attached.

[Endorsed]: Filed July 10, 1957.

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[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE TO THIRD PARTY  
DEFENDANT'S MOTION FOR MORE  
DEFINITE STATEMENT

Comes Now the plaintiff, United States of America, for the use of Apache Powder Company, and, in response to the Motion for More Definite Statement, requesting an account of the materials furnished to defendant Pioneer Constructors prior to November 1, 1956, and to defendant Construction Materials Company subsequent to that date, filed herein by Hartford Accident and Indemnity Company, third party defendant, states as follows:

1. The materials furnished by Apache Powder Company prior to November 1, 1956, for use in the prosecution of the work under the prime contract with the United States of America, were furnished from and including June 13, 1956, to and including October 24, 1956, were of the agreed

and reasonable value of \$20,900.39, and were furnished to Pioneer Constructors.

2. The materials furnished by Apache Powder Company subsequent to November 1, 1956, for use in the prosecution of the work under the prime contract with the United States of America, were furnished from and including November 2, 1956, to and including March 12, 1957, were of the agreed and reasonable value of \$12,553.32, and were furnished to Pioneer Constructors and Construction Materials Company. Such materials were delivered to Construction Materials Company, but were invoiced to Pioneer Constructors, Apache Powder Company then being informed and believing that Construction Materials Company was a division of Pioneer Constructors, and believing and having reason to believe it was furnishing all of said material to Pioneer Constructors under the subcontract of March 30, 1956.

EVANS, KITCHEL & JENCKES,

/s/ By ALFRED B. CARR,

Attorneys for Plaintiff.

Notice of Mailing Attached.

[Endorsed]: Filed July 16, 1957.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT PIONEER  
CONSTRUCTORS, A CORPORATION

Comes now the defendant, Pioneer Constructors, a corporation, and in answer to plaintiff's com-

plaint filed herein, admits, denies and alleges as follows:

1. Incorporates herein by reference, the same as if they were set forth herein in full, paragraphs I through VIII of the pleading heretofore filed in the above entitled cause, entitled, "Answer of Defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company."

2. This defendant specifically alleges that the notice referred to in paragraph XI of plaintiff's complaint was not furnished and delivered by the plaintiff within 90 days from the date on which the last of any material was furnished and delivered to this defendant.

Wherefore, this defendant prays that plaintiff take nothing by its action or complaint and that the same should be dismissed against this defendant and that this defendant recover its costs herein expended.

FICKETT & DUNIPACE,

/s/ By FRED W. FICKETT,

Attorneys for Defendant Pioneer  
Constructors, a Corporation.

Notice of Mailing Attached.

[Endorsed]: Filed July 18, 1957.

[Title of District Court and Cause.]

ANSWER OF THIRD PARTY DEFENDANT  
TO PLAINTIFF'S COMPLAINT

Comes now the third party defendant, Hartford Accident and Indemnity Company, a corporation, and for its answer to plaintiff's complaint and to plaintiff's more definite statement thereon admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs I, II, III and V of said complaint;

II.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph IV of said complaint;

III.

Admits the allegations set forth in paragraph VI of said complaint except the allegations that the termination of the contract with Pioneer Constructors was without notice to or knowledge by plaintiff and in this connection on information and belief alleges that notice was given to plaintiff of said termination and that plaintiff had knowledge thereof;

IV.

Admits the allegations set forth in paragraph VII of said complaint except the allegation that the matters and things set forth therein were with-



out notice to or knowledge thereof by plaintiff and in this connection alleges on information and belief that plaintiff had notice and knowledge thereof;

V.

Denies the allegations set forth in paragraph VIII of said complaint;

VI.

In answer to the allegations set forth in paragraph IX of said complaint admits that plaintiff furnished materials to Pioneer Constructors and Construction Materials Company; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the agreed and reasonable value of said materials; denies each and every allegation set forth in paragraph IX not herein specifically admitted;

VII.

In answer to the allegations set forth in paragraph X of said complaint this defendant alleges on information and belief that no sum is owing to plaintiff by defendant Construction Materials Company and alleges on information that defendant Construction Materials Company has paid plaintiff for all materials furnished to said defendant by plaintiff; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in said paragraph X;

VIII.

Denies the allegations set forth in paragraph

XI of said complaint and in this connection alleges that the subcontract of defendant Pioneer Constructors was terminated as of November 1, 1956, and from and after said date no work was done on said job on said subcontract nor were any materials purchased by or furnished to said Pioneer Constructors from and after the first day of November, 1956, and that no notice was given to the prime contractor on said job by plaintiff within ninety days from the date on which the last of the material was furnished by it to defendant Pioneer Constructors;

IX.

In answer to the allegations set forth in paragraph XII alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that performance thereof has been completed; admits the remaining allegations set forth in said paragraph.

X.

Admits the allegations set forth in paragraph XIII of said complaint;

XI.

Denies each and every allegation set forth in said complaint not specifically admitted herein;

XII.

Further answering, third party defendant alleges that complaint does not state a claim upon which relief can be granted.

XIII.

In answer to the allegations set forth in paragraph 1 of plaintiff's response to motion for more definite statement, third party defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein and therefore denies the same;

XIV.

In answer to the allegations set forth in paragraph 2 of said response, third party defendant admits that plaintiff furnished materials to defendant Construction Materials Company; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the value of said materials; denies that any materials were furnished to defendant Pioneer Constructors subsequent to November 1, 1956; admits that said materials were delivered to said Construction Materials Company; denies each and every allegation set forth in said paragraph 2 not herein specifically admitted and further alleges on information and belief that Construction Materials Company has paid plaintiff for all materials furnished to said Construction Materials Company;

XV.

Denies each and every allegation set forth in said response not herein specifically admitted.

Wherefore, third party defendant prays that de-

defendant take nothing by its complaint and for its costs herein expended.

CONNER & JONES,

/s/ By A. O. JOHNSON,

Attorneys for Third Party  
Defendant.

Notice of Mailing Attached.

[Endorsed]: Filed July 23, 1957.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE TRAVEL-  
ERS INDEMNITY COMPANY, A COR-  
PORATION

Comes now the defendant The Travelers Indemnity Company, a corporation, and in answer to plaintiff's complaint filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, IV, and V of plaintiff's complaint.

II.

In answer to paragraph VI of plaintiff's complaint, admits the allegations set forth in paragraph VI of plaintiff's complaint except the allegation that the plaintiff was not notified and had no knowledge as to the termination of said subcontract and as to those allegations, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.



III.

Admits the allegations set forth in paragraph VII of plaintiff's complaint except the allegation that the plaintiff was without notice or knowledge of the contract referred to in said paragraph and as to those allegations, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

IV.

In answer to paragraph VIII of plaintiff's complaint, admits that the work to be performed under the subcontract to the defendant Construction Materials Company was included in the subcontract with the defendant Pioneer Constructors, which work was not completed prior to the termination of the Pioneer Constructors' subcontract; denies that said subcontracts were one and the same and denies that the work called for in the Construction Materials Company's subcontract has been completed.

V.

In answer to paragraph IX and X of plaintiff's complaint alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs IX and X of the complaint and therefore denies the same.

VI.

In answer to paragraph XI of plaintiff's complaint, admit that the plaintiff did send written notice to the defendant The Ashton Company, Inc.,

Contractors and Engineers, and Mardian Construction Company, corporations engaged in a joint venture as Ashton-Mardian Company, as in said paragraph alleged. This defendant, however, alleges that it has no knowledge or information sufficient to form a belief as to whether or not said notice was received within ninety days from the date on which plaintiff furnished or supplied the last of the materials on which the claim is based and therefore denies this portion of paragraph XI.

#### VII.

In answer to paragraph XII of plaintiff's complaint, admits that the defendant Construction Materials Company and the defendant The Ashton Company, Inc., Contractors and Engineers, and Mardian Construction Company, corporations engaged in a joint venture as Ashton-Mardian Company, continued to perform the subcontract of the defendant Construction Materials Company and the prime contract of said defendant with the United States of America, but denies that the performance thereof has been completed and admits that final settlement of said contract with the United States of America has not been made.

#### VIII.

Admits the allegations contained in paragraph XIII of plaintiff's complaint.

Wherefore, this defendant prays that plaintiff

take nothing by its complaint and for its costs herein expended.

HALL, CATLIN & MOLLOY,  
/s/ By HAMILTON R. CATLIN,  
Attorneys for defendant The Travelers Indemnity Company.

Notice of Mailing Attached.

[Endorsed]: Filed August 1, 1957.

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[Title of District Court and Cause.]

### PRE-TRIAL CONFERENCE

The Above Entitled Matter came on regularly for hearing on the 30th day of January, 1958, before the Honorable James A. Walsh, Judge of the United States District Court, Federal Courthouse, Tucson, Arizona, commencing at the hour of 10:00 o'clock a.m. on said day and the following proceedings were had, to wit: [4]\*

\* \* \* \* \*

The Court: That is right.

What is the view of counsel as to this method of procedure to keep it a little more simple: If we separate for trial and try first the issues made by the complaints and answers to the complaints with the right of all who are parties to participate in that trial and to adduce evidence that bears on the issues made by the complaints and answers to the complaints.

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\* Page numbers appearing at top of page of Reporter's Transcript of Pre-Trial Conference.

What I am getting at, we have the question of release here; Mr. Johnson has it in one of his answers. We have the question of counterclaims and crossclaims and third party claims and all of those are subsidiary, of course, to there being recovery on the complaints. It seems to me that the logical way to approach it would be to try the case on the complaints and answers and then, depending on the judgment. [6] \* \* \* \* \*

Mr. Johnson: It seems to me that is logical.

The Court: What is the thinking of counsel to confining the original trial to the issues made by the complaints and the answers?

Mr. Fickett: I think it is a very practical suggestion.

Mr. Catlin: Mr. Johnson would be interested in participating in that stage only.

The Court: I said that all parties would be entitled to participate and offer proof, because they all have a stake.

In other words, what we are doing actually is merely trying the case in stages and not cutting anybody out of a right that they would have had if we tried it all at once. What I am trying to do is avoid having to take up those things unless they really have to be decided.

Well, unless there is objection to the date set, we will proceed on that basis and try the issues made by the complaints and the answers to the complaints with the right of all parties to participate and to offer evidence within those issues.



Mr. Carr: Are both of these cases set on March 4?

The Court: They are not consolidated but they are set at the same time because we have common issues of fact, I am sure, and probably at law. [7]

\* \* \* \* \*

The Court: In the Apache Powder case, as I got the issues from the pleadings, assuming there again there is no real issue as to whether materials were furnished by Apache Powder and as to the amounts paid for the materials, first, was there in fact and/or in law actually only one subcontract under which the use plaintiff furnished all of the material.

They take the position that this was all actually just one subcontract and that they furnished all of their material under one subcontract, and that actually is denied by the defendants.

The second issue, as I see it, would be if there was in fact and/or in law only one subcontract, were sufficient notices given within ninety days.

The third one would be if there was more than one subcontract, is there any estoppel against the prime contractor and the surety claiming that the use plaintiffs furnished materials under two distinct subcontracts and were required to give ninety days notice on material furnished under such subcontract; if, in fact, there were two subcontracts, [11] is there any estoppel against the prime and the surety to claim that there were two and that the notice was required on each.

The fourth issue that I see is, did the use plain-

tiffs have actual notice of the change of subcontractors.

The fifth would be, did the use plaintiffs furnish materials to Pioneer as Pioneer and to Construction as Construction, extending credit to the specific company to which the materials were furnished.

Sixth, were the use plaintiffs charged with notice that they were dealing with a new and different subcontractor after November 1, 1956, and if so, when did they become charged with that notice.

Those are the issues as I would frame them. Does anybody have any additional ideas?

Mr. Carr: I just have two questions here, your Honor, as to scope of evidence that might be introduced under each.

Under number one, is it understood that evidence may be introduced to the effect that the two subcontractors had the same offices, some of the same offices, employees; that the two subcontracts were performed under the same management, generally the same equipment and personnel and the use of the same supplies and the same suppliers.

It is my understanding of this question that that type of evidence would be admissible under that issue. I [12] just wanted to verify it.

The Court: I would say so, yes.

Mr. Johnson: I assume, your Honor, by making that ruling now is not precluding us from objecting to the admissibility of that evidence at the trial?

The Court: Oh, no.

Mr. Carr: Under two, if there was in fact and/or in law only one subcontractor, were suffi-

cient notices given within ninety days. I assume there is no dispute as to the delivery of the notice by Apache dated April 25th as alleged in the complaint? It would be a matter of a few moments to introduce it, but——

Mr. Catlin: Is that attached to the pleadings?

Mr. Carr: No, a copy isn't attached. The allegation was made. That is in paragraph eleven of the complaint.

Mr. Johnson: I might state at this time that only Ashton-Mardian and Apache knows how that notice was delivered, whether it was registered mail or by process. Now, whether it was actually served that way, I don't know.

The Court: The cases hold that regular mails are sufficient. The Supreme Court of the United States has so held. You can't get any higher than that. The Court says what the Statute is aiming at is to get the notice, and if regular mail was received, it doesn't have to be registered.

Mr. Carr: As a matter of fact, it was, your Honor. It was just a detail of evidence as to proof of the receipt [13] of the notice as of that date at that specific time, of course, saving the question as to whether the notice was filed within the time required.

You admit service of the notice as alleged, but do not state whether or not it was within ninety days.

Mr. Catlin: I thought that was the case.

Mr. Fickett: That admission answers your question, doesn't it, Mr. Carr?

Mr. Carr: Except that I don't believe it is uni-

form through the pleadings of all of the defendants.

The Court: Are any of the defendants or third party defendants going to go into the actual giving of the notice? In other words, are you in disagreement with Ashton-Mardian's admission?

Mr. Fickett: May I state that Pioneer agrees with Ashton-Mardian's admission.

Mr. Johnson: You say you sent this by registered mail? Do you have the registered receipt showing the date?

Mr. Carr: Yes.

Mr. Johnson: Do you have it with you now?

Mr. Carr: No, I don't.

Mr. Johnson: Well, whatever date that registered receipt shows, we will take that as the date.

I will state this: We will be bound by Ashton-Mardian's admission that notice was received. I don't think [14] they have alleged or admitted the date. That may be the material angle but we don't have the information on it.

Mr. Carr: In paragraph three reference is made as to estoppel.

The Court: The question is whether or not evidence would be admissible under that as to the reasons for the consideration for and the circumstances surrounding the termination of the Pioneer contract and the execution of the Construction Material's contract.

Mr. Carr: We have very little evidence as yet as a result of the depositions of Mr. Skorpick and Mr. Simmons, but there is some question, and in view of the Court's use of the word "estoppel" and sug-



gesting the question of estoppel here, we think that is material and might be necessary for us to go into that question.

The Court: I could only say in the absence of some specific matters, Mr. Carr, that anything that would bear on this issue, that I am not foreclosing objections to it again, but I am telling you that I would be inclined to hear anything that was relevant on the issue of estoppel.

Mr. Carr: And under four, "Did the use plaintiffs have actual notice of the change of subcontractors?", I assume under that, your Honor, that you include everything—that is for the benefit of the defendants as well as the plaintiffs—would include anything that might be considered as direct and [15] actual notice for something which might have and should have put the use plaintiffs on notice?

The Court: I had in mind the latter more nearly in six, even though they didn't have actual notice, were they in possession of such facts that they were charged with notice.

Mr. Carr: Just so those are included. Those are all of my questions. [16]

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Mr. Thompson: Now Construction Materials isn't a defendant in the Armco case, however, I would like to ask counsel for them if they have a copy of this second subcontract that was executed.

Mr. Catlin: I think I can furnish you that.

Mr. Evans: I don't have an extra copy.

Mr. Thompson: Mr. Johnson, in regard to one

of your pleadings, you have stated that there was a release attached thereto. There was none attached to the copy received by Armco.

Mr. Johnson: We will furnish you one.

Mr. Thompson: There will be no question raised by the defendant or third party defendant as to whether or not the materials used in the subcontract or subcontracts were a part of the materials required and used under the prime contract?

Mr. Catlin: That is correct, no issue.

Mr. Johnson: No issue. [19]

Mr. Fickett: Pioneer agrees.

Mr. Thompson: I think that is all I have at this time.

Mr. Johnson: I would like to ask for one or two admissions from the plaintiffs if they will so admit.

I would like to ask if the plaintiff will admit and stipulate that there were separate subcontracts, that the Pioneer Constructor's subcontract terminated on or about the 1st day of November, 1956 and that the contract was thereupon entered into with Construction Materials by the prime contractor?

Mr. Carr: Are you referring to separate pieces of paper executed by different parties?

Mr. Johnson: I am referring to contracts executed by the parties.

Mr. Carr: Your question is too general, Mr. Johnson. I don't want to make any admissions on that particular fact. In fact, the pleadings of the complaint, I think, would answer your question, but I just feel that the question is too general.

Mr. Johnson: In that case, we will be prepared

to prove that point rather than asking for an admission on it.

One other question of Apache Powder, you are claiming some \$20,900 in your complaint. Is it not true that there was a later credit on that job which is not reflected in the [20] pleadings?

Mr. Carr: Yes, we are prepared to introduce and show the application on the account of a credit memo to Pioneer Constructors in the sum of \$1,952.72 given at the termination by Construction Materials of the work at which time we took back what they had on hand and gave them credit for that amount, but it was a credit to Pioneer Constructors on the Pioneer Constructors' contract. That reduces the claim to \$18,947.96.

Mr. Evans: The only thing that concerns me about that, I have here a letter addressed to Construction Materials Company from Apache Powder signed by Mr. Henderson talking about this material which was removed from the Ajo job.

Mr. Carr: Well, that is a different matter entirely.

Mr. Evans: Is that a different job?

Mr. Carr: Yes.

Mr. Johnson: I take it your question goes to the question of whether or not the plaintiff had a right to credit the construction materials they picked up on the Pioneer account, is that right?

Mr. Carr: Yes. Well, I was just stating the fact of what we did. We issued the credit memo to Pioneer on the Pioneer account.

Mr. Evans: Let me ask you this: Does your

company [21] have any account that it carries at the present time in the name of Construction Materials Company that covers any work done or any materials furnished on this job?

Mr. Carr: No, we have never had an account with Construction Materials.

Mr. Evans: And even today you do not have?

Mr. Carr: No.

Mr. Evans: Let me ask you another question: Is there any, or is it agreed, or could it be agreed that the value of the materials furnished by Apache for use on the job in question subsequent to November the 1st, 1956 was of the value of whatever it was?

Mr. Carr: Well, that statement is made in our more definite statement in response to, I guess—I have forgotten,—which somebody required us to make a more definite statement.

Mr. Johnson: That was our motion.

Mr. Carr: Oh, yes, as we specified in that more definite statement that certain materials were—

Mr. Evans: Well, would Apache stipulate that Apache was paid by Construction Materials Company that sum subsequent to November 1, 1956?

Mr. Carr: No, because again that question is too general. As a matter of fact, we have received some payment which you have already shown in the deposition of Simmons, but we are getting into such a broad area there and it is a matter [22] of detailed presentation that I would want preserved.

Mr. Evans: Well, I was just thinking about that because I can see how you might be able to say that



Pioneer and Construction Materials were one and the same company and therefore that Pioneer would be responsible for acts or stuff received by Construction Materials, but I don't see how you can turn the thing around.

Mr. Carr: Well, that is a question.

Mr. Evans: In other words, I don't see how you could hold Construction Materials responsible for merchandise or materials that were delivered on the account of Pioneer Constructors, that is why I asked you if you had any account for Construction Materials and I noticed that the various invoices that I have which represent this twelve thousand some odd dollar figure are all invoiced to Pioneer.

Mr. Carr: That's right. All the invoices were to Pioneer; there was never an account with Construction Materials. All payments were credited on Pioneer's account and the credit memo I just mentioned was credited to the Pioneer account.

Mr. Evans: Are you prepared to stipulate that the Apache Powder Company delivered the various materials for which the recovery is sought and extended credit upon the basis of the credit of Pioneer Constructors as opposed to Construction Materials Company? [23]

Mr. Carr: No, I wouldn't want to make that stipulation.

Mr. Evans: Well, I wonder how you could show any reliance upon the credit of Construction Materials Company if, as you say, that at no time Apache had an account with Construction Materials.

Mr. Carr: That is a very good question, but I prefer not to say.

The Court: Mr. Carr, in response to their motion for more definite statement, you state such materials were delivered to Construction Materials Company but were invoiced to Pioneer Constructors; Apache Powder Company then being informed and believes that Construction Materials was a division of Pioneer Constructors and believing and having reason to believe it was furnishing all of said material to Pioneer Constructors under the subcontract of March 30, 1956.

Mr. Carr: Yes. I assumed, your Honor, that counsel's question was on the basis of Construction Materials being a separate corporation and that is why I—it is a tricky question—not that it is intended to be—but I think that we could best work that out by presentation of evidence.

Mr. Evans: You see, our point is simply this: It is obvious from the pleadings themselves that they are separate corporations, they are sued as separate corporations. Pioneer Constructors, a corporation, Construction Materials [24] Company, same thing. Now I think from the depositions on file and from the answers to the interrogatories that it is clear that Apache Powder Company had been paid twelve thousand five hundred some odd dollars subsequent to November 1st, which is the, I believe the amount or the value of the materials that were furnished after November 1st, 1956 and I just can't get it through my thick head how Construction Materials Company can be responsible for anything

that happened before that and why it should have to come down here and go through a whole trial on the basis of the pleadings, the depositions and the invoices and everything and the checks that are attached to the deposition and so on. If Pioneer owes the money, then they have got a bond and Construction Materials, I guess, has the same bonding company, doesn't it?

Mr. Johnson: That's right, different bond but same company.

Mr. Evans: It is the same thing and I can see how Pioneer might be responsible for Construction Materials' shortcomings, but I can't see how it works the other way around.

Mr. Carr: But you want to claim credit on behalf of Construction Materials for moneys paid to Apache on invoices to Pioneer on an account with Pioneer.

Mr. Evans: Because Construction Materials admitted they used that material. [25]

The Court: Of course on pre-trial, Mr. Evans, you can't get around more than you can get together on, and taking your statement at face value, you have very seldom had it so good.

Are there any other stipulations?

Mr. Fickett: I would like to ask Mr. Carr this question: With reference to this \$12,533.02 you admit, Mr. Carr, don't you, that all of the payments for that total sum of money were paid by checks drawn by Construction Materials Company on a bank account of Construction Materials Company?

Mr. Carr: Yes. Yes, but it is a question of application that is important. [26]

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Mr. Carr: If there is nothing further, I would offer in evidence the copy of the prime contract between the Government and Ashton Building Company and Mardian Construction Company with the payment bond certified by the general contractor's office.

The Court: Is counsel familiar with this? [27]

I am going to mark it on the back in pencil, "Apache 1" and circle it, and may it be stipulated that what I have so marked may be marked in evidence by the clerk on the trial?

Mr. Fickett: Yes.

Mr. Johnson: No objection.

Mr. Catlin: And we are willing to stipulate that the photostatic copies of the two subcontracts attached to the crossclaim of Ashton-Mardian are true copies and may be admitted.

Mr. Carr: Will you be able to supply copies for the record, Mr. Catlin?

Mr. Catlin: Yes.

The Court: I am going to mark these "JV-a" and "JV-b". And may it be stipulated that these I have so marked may be marked in evidence by the clerk on the trial?

Mr. Johnson: So stipulated.

The Court: That is in Civil 967.

Mr. Evans: Your Honor, I have four separate sets of papers here, all of which are statements from or invoiced from, or bills of lading, covering



the shipments made by Apache of materials used on this job, all shipments being subsequent to November 1, 1956 which I would like to offer.

Mr. Fickett: Pioneer has no objection.

Mr. Johnson: No objection.

Mr. Evans: We would also like the clerk to mark in [28] evidence on behalf of Construction Materials Company the checks of Construction Materials Company which are attached to the original deposition in the file of the case.

The Court: Let's take this one at a time, Mr. Evans.

Mr. Evans: Yes.

Mr. Carr: If the Court please, I am not familiar with these invoice numbers and I am not so familiar with them that I could check them from memory. I have no objection to the introduction of these documents by Construction Materials as being the reports of the transaction, but do not want to be bound by the detail as to the total number of invoices, the numbers and amounts and so forth, and I have a further reservation in this respect, that some of these invoices do not have attached copies of the bills of lading, others have copies of the bills of lading attached, which are not completed showing the receipt by Pioneer Constructors or Construction Materials. I notice that three or four of the bills of lading——

The Court: To shorten it up, counsel is submitting them and asking if it may be stipulated that the clerk may mark these in evidence in 967. If it could be stipulated, I will label them now and——



Mr. Carr: Oh, yes, as being their record without any admission as to completeness or accuracy or anything of that sort? [29]

The Court: They will be received as offered and, of course, they are the exhibit of Construction Materials Company and you wouldn't be bound by it unless there is some stipulation in here that I don't know about.

I will mark what we have been talking about as Construction's A, B, C and D, and the record may show the stipulation that the clerk will mark those in evidence on the trial.

Mr. Carr: May it be understood that Apache Powder may at the trial introduce its records of orders invoiced dissipating and other material relating to the account?

The Court: Well, unless you have them here, you will have to offer them on the trial.

Mr. Evans: And we would also like by stipulation for the Court to mark in evidence as an additional exhibit for Construction Materials Company the four checks, three checks of the Construction Materials Company, that are attached to the deposition of J. E. Skorpick and Melvin Simmons.

Mr. Carr: Okay.

The Court: Is that stipulation satisfactory?

Mr. Fickett: Yes.

Mr. Johnson: Is it also stipulated that these copies of the checks and the attachments thereto are copies of the original which were received by Apache Powder Company? They purport to be carbon copies. [30]

Mr. Carr: I believe they are, your Honor, but I just hesitate to say.

Mr. Johnson: In other words, we are in this position: the checks and then there is a copy which shows which invoices they are purporting to pay, a copy of the statement. Will counsel stipulate now to avoid our necessity of subpoenaing some of their organization that they did receive it? I am asking for that stipulation.

Mr. Carr: You have the cancelled checks and we have the voucher attached to the original, so I am certain, your Honor, that there will be no question about it, but I haven't actually checked Apache's records since that deposition was taken.

Mr. Johnson: Will counsel agree to notify me if he will not so stipulate to give me time to subpoena the original from the Apache organization? In other words, we think that Apache received the originals of those vouchers or those statements which are attached to the checks.

Mr. Carr: Yes, I will agree to notify you if that is the fact.

The Court: I will then mark these as Construction's E, F and G and the record will show the stipulation that they may be marked in evidence by the clerk on the trial.

Does anybody else have any exhibits? [31]

Mr. Catlin: Your Honor, is it clear in both of these cases—it just occurs to me—I think the pleadings make it clear that both of the Use Plaintiffs are suing in this action under the Miller Act and not as materialmen to a subcontractor. Is it clear

that neither of the plaintiffs are alleging a [35] direct relationship with the prime contractor, with my clients, the joint venture?

Mr. Thompson: As of this time, no. We may change our theory half way through the trial.

Mr. Catlin: Let me state that I know of no basis upon which they could, but I don't even know if it is necessary to clear that up or not.

The Court: I take it that it is agreed that as of now that there is no claim that they had a direct contractual relation with the joint venture?

Mr. Johnson: I will state at this time that I will file a motion to amend my complaint on the basis of this.

The Court: Is that all the progress we can make on exhibits, stipulations?

Mr. Thompson: If the Court please, as far as the subcontracts which have been introduced in Civil 967, I wonder if those could also be utilized as counsel desires in 966?

Mr. Fickett: That is agreeable as far as we are concerned.

Mr. Johnson: We will stipulate that any exhibits that are introduced in either case, the same stipulation may apply to either case as far as they are material.

Mr. Catlin: Yes. [36]

[Endorsed]: Filed February 19, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,  
JANUARY 30, 1958

November 1957 Term (Tucson Division) at Tucson  
Honorable James A. Walsh, United States District  
Judge, Presiding.

This cause comes on regularly for pre-trial conference this day. Alfred B. Carr, Esq., appears for the plaintiff. Hamilton Catlin, Esq., appears for the defendants Travelers Indemnity Company and Ashton-Mardian Company. Richard Evans, Esq., is present for the defendant Construction Materials Company. Fred W. Fickett, Esq., appears for the defendant Pioneer Constructors, and A. O. Johnson, Esq., appears for the defendant Hartford Accident and Indemnity Company.

Court and counsel agree that the issues made by the complaints and answers should be tried on Tuesday, March 4, 1958, and that the issues made by the Third Party complaints and answers thereto, counterclaims and answers thereto, and cross-claims and answers thereto, should be reserved for later and separate trial and It Is So Ordered.

Court and counsel agree that the issues formed by complaints and answers are stated in a typewritten sheet marked "Issues framed on pre-trial, etc." attached to the Court's record of proceedings at pre-trial. Counsel enter into various stipulations of fact which are recorded by the reporter.

It is stipulated by all parties that the following documents, marked in pencil by the Court as indi-



ated, may be marked in evidence by the Clerk herein, viz: Apache 1, J VA and J VB, Construction A to Construction G, inclusive.

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[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,

FEBRUARY 28, 1958

November 1957 Term (Tucson Division) at Tucson  
Honorable James A. Walsh, United States District  
Judge, Presiding.

Plaintiff's Motions for Leave to Amend Complaint and for Order Vacating Trial Setting come on regularly for hearing this day. Alfred B. Carr, Esq., is present for the plaintiff; Hamilton R. Catlin, Esq., is present for the defendants Travelers Indemnity Company and Ashton-Mardian Company; A. O. Johnson, Esq., is present for the Third Party Defendant Hartford Accident and Indemnity Company.

It Is Ordered that the plaintiff's Motion for Leave to File an Amended Complaint is granted, and

It Is Ordered that the Clerk is directed to file the plaintiff's Amended Complaint which is attached to said Motion.

It Is Ordered that the trial of the issues to be formed by the second count of the Amended Complaint and the answer thereto of the defendant Construction Materials Company be separated from the other issues and that the other issues will be tried as heretofore set on Tuesday, March 4, 1958, at 10 a.m.



[Title of District Court and Cause.]

## AMENDED COMPLAINT

### First Count

The United States of America, suing herein for the use and benefit of Apache Powder Company, a corporation, alleges:

#### I.

This action is brought under the Act of Congress of August 24, 1935, c. 642, § 2,49 Stat. 794, 40 U.S.C.A. § 270b, known as the Miller Act, on the payment bond of the contractor under a contract with the United States of America which was to be and was performed and executed within the District of Arizona.

#### II.

Apache Powder Company is a New Jersey corporation, authorized to do business in the State of Arizona. The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company are Arizona corporations engaged in a Joint Venture as Ashton-Mardian Company. The Travelers Indemnity Company is a Connecticut corporation, authorized to do business in the State of Arizona. Pioneer Constructors and Construction Materials Company are Arizona corporations.

#### III.

On or about March 30, 1956, the defendants, The Ashton Company, Inc., Contractors and Engineers,

as Ashton Building Company, and Mardian Construction Company, engaged in a Joint Venture as Ashton-Mardian Company, duly entered into a contract in writing with the United States of America, Corps of Engineers, United States Army, wherein and whereby it was agreed that said defendants were to furnish the material and perform the work for the construction and completion of Air Force Station TM-181, a radar station five miles North of Ajo, Pima County, State of Arizona, in accordance with plans and specifications and terms and conditions, therein specifically set forth, in consideration whereof the United States of America agreed to pay said defendants the sum of Two Million Three Hundred Fifty-one Thousand Six Hundred Thirty-seven and no/100ths Dollars (\$2,351,637.00).

#### IV.

On or about March 30, 1956, pursuant to the Act of Congress of August 24, 1935, c. 642, § 1,49 Stat. 793, 40 U.S.C.A. § 270a, and pursuant to the terms of the aforesaid contract, said Ashton-Mardian Company, a Joint Venture, as principal, and defendant, The Travelers Indemnity Company, as surety, for a valuable consideration, made, executed, and delivered to the United States of America their Payment Bond in the sum of Nine Hundred Forty Thousand Six Hundred Fifty-five and 04/100ths Dollars (\$940,655.04), the condition of which bond, as required by the said Act of Congress, is that the said principal shall promptly make payment to all persons supplying labor and

material in the prosecution of the work provided in said contract.

V.

On or about March 30, 1956, said Ashton-Mardian Company, a Joint Venture, as the prime contractor under said contract with the United States of America, entered into a subcontract with defendant, Pioneer Constructors, for the performance and completion of certain parts of the work, specified in said subcontract, which were to be performed and completed under said contract with the United States of America, in accordance with the plans and specifications and terms and conditions of said prime contract, in consideration whereof said prime contractor agreed to pay to said defendant Pioneer Constructors the sum of Four Hundred One Thousand Two Hundred Seventeen and 83/100ths Dollars (\$401,217.83).

VI.

Upon information and belief, the said Ashton-Mardian Company, as the prime contractor, and defendant, Pioneer Constructors, as a subcontractor, under said contract with the United States of America, entered upon the performance of said prime contract and subcontract and furnished labor and material therefor, but, without any notice to Apache Powder Company by any of the defendants and without any knowledge thereof by Apache Powder Company, said subcontract with defendant, Pioneer Constructors, was terminated on or about November 1, 1956.

## VII.

That, without any notice to Apache Powder Company by any of the defendants and without any knowledge thereof by Apache Powder Company, on or about November 1, 1956, said Ashton-Mardian Company, a Joint Venture, as the prime contractor under said contract with the United States of America, entered into a subcontract with defendant Construction Materials Company for the performance and completion of certain parts of the work, specified in said subcontract, which were to be performed and completed under said contract with the United States of America, in accordance with the plans and specifications and terms and conditions of said prime contract, in consideration whereof said prime contractor agreed to pay to said defendant, Construction Materials Company, the sum of Two Hundred Sixty-six Thousand Three Hundred Ninety-one and 66/100 Dollars (\$266,391.66).

## VIII.

Upon information and belief, the work to be performed under said subcontract of November 1, 1956, by defendant, Construction Materials Company, was identical with the work to be performed under said subcontract of March 30, 1956, by defendant, Pioneer Constructors, and said two subcontracts were in fact one and the same subcontract, part of which was performed and completed by defendant, Pioneer Constructors, and the remainder of which was performed and completed by defendant Construction Materials Company.



## IX.

That from and including June 13, 1956, to and including October 31, 1956, on an open account at the special instance and request of defendant, Pioneer Constructors, Apache Powder Company furnished material consisting of explosives and blasting supplies to Pioneer Constructors for use in the prosecution of the work under its subcontract and said prime contract with the United States of America, of the agreed and reasonable value of Twenty Thousand Nine Hundred and 39/100ths Dollars (\$20,900.39), which material was delivered by Apache Powder Company on said radar station job and was used by Pioneer Constructors in the prosecution of the work under said subcontract and said prime contract with the United States of America.

That from and including November 1, 1956, to and including March 12, 1957, on said open account with Pioneer Constructors, at the special instance and request of Construction Materials Company, Apache Powder Company, being then informed by Construction Materials Company, and believing and having reason to believe, that Construction Materials Company was merely a division or agent of Pioneer Constructors, continued to furnish material consisting of explosives and blasting supplies to said radar station job for use in the prosecution of the work under the Pioneer Constructors subcontract of March 30, 1956, and said prime contract with the United States of America, which material was delivered by Apache Powder



Company on said radar station job and was used in the prosecution of the work required to be done under the Pioneer Constructors subcontract and said prime contract with the United States of America.

That the agreed and reasonable value of the materials furnished after November 1, 1956, is Twelve Thousand Five Hundred Fifty-three and 32/100ths Dollars (\$12,553.32), making the total of all materials furnished Thirty-three Thousand Four Hundred Fifty-three and 71/100ths Dollars (\$33,453.71).

#### X.

There remains due, owing, and unpaid to Apache Powder Company from Pioneer Constructors, after all payments and credits have been allowed, upon said material furnished, delivered, and used as aforesaid, the sum of Eighteen Thousand Nine Hundred Forty-seven and 96/100ths Dollars (\$18,947.96), no part of which sum has been paid, although payment thereof has been duly demanded.

#### XI.

The last of said material was furnished and delivered by Apache Powder Company on or about March 12, 1957, and, pursuant to the Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b, and within ninety (90) days from the date on which the last of said material was furnished and delivered, to-wit, on April 25, 1957, Apache Powder Company gave written notice to Ashton Building Company, Mardian Construc-

tion Company, and Ashton-Mardian Company, a Joint Venture, the prime contractor under said contract with the United States of America, stating with substantial accuracy the balance due and amount claimed by Apache Powder Company and the names of the parties to whom the material was furnished, which notice was served in the manner required by said Act of Congress.

## XII.

Upon information and belief, defendant, Construction Materials Company and said Ashton-Mardian Company, continued to perform said subcontract and said prime contract with the United States of America, and performance thereof has been completed, but final settlement of said contract with the United States of America has not been made.

## XIII.

That a period of ninety (90) days after the day on which the last of said material was furnished and delivered has expired, and that one (1) year after the date of final settlement of said contract with the United States of America has not expired.

Wherefore, the United States of America, on behalf and to the use of Apache Powder Company, prays judgment against defendants The Ashton Company, Inc., Contractors and Engineers, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, The Travelers Indemnity Company, and Pio-

neer Constructors for the sum of Eighteen Thousand Nine Hundred Forty-seven and 96/100ths Dollars (\$18,947.96) with interest, for costs of suit herein incurred, and for such other and further relief as the Court may deem just and proper.

EVANS, KITCHEL & JENCKES,  
/s/ By ALFRED B. CARR,  
Attorneys for Plaintiff.

\* \* \* \* \*

[Endorsed]: Filed February 28, 1958.

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[Title of District Court and Causes.]

MINUTE ENTRY OF TUESDAY,  
MARCH 4, 1958

November 1957 Term (Tucson Division) at Tucson.  
Honorable James A. Walsh, United States District  
Judge, Presiding.

This case comes on regularly for trial this day before the Court sitting without a jury. Howard Thompson, Esq., and John Elliott, Esq., appear as counsel for the plaintiff Armco Drainage & Metal Products, Inc. Alfred B. Carr, Esq., and Ralph Lester, Esq., appear as counsel for the plaintiff Apache Powder Company. Hamilton R. Catlin, Esq., appears as counsel for the defendants Ashton Company, Inc., Contractors and Engineers and Mardian Construction Company, dba Ashton- Mardian Company, and Travelers Indemnity Company. A. O. Johnson, Esq., appears as counsel for the Third Party Defendant, Hartford Acci-

dent and Indemnity Company. Fred W. Fickett, Esq., appears as counsel for the defendant Pioneer Constructors.

Both sides announce ready for trial.

It Is Ordered that the motion of the Third Party Defendant, Hartford Accident and Indemnity Company to amend its answer to the Complaint and Third Party Complaint is denied in case Civil-966 Tucson.

On motion of Howard Thompson, Esq., counsel for the plaintiff Armeo Drainage & Metal Products, Inc.,

It Is Ordered that the transcript of the pre-trial conference held herein on January 30, 1958, and filed herein on February 19, 1958, is incorporated as a part of the trial record in this cause. Counsel stipulate that the testimony of all the witnesses may be testimony in both cases Civil-966 Tucson and Civil-967 Tucson, where applicable.

Plaintiff Armeo Drainage & Metal Products, Inc.'s  
Case:

Donald G. Putnam is sworn and examined on behalf of said plaintiff.

The following said plaintiff's exhibits are admitted in evidence:

- 1, carbon copy of list of sub-contractors
- 2, copy of letter

William Johnson is sworn and examined on behalf of said plaintiff.

Said plaintiff's exhibit 4, order form, is admitted in evidence.



Gerard John Sturm is sworn and examined on behalf of said plaintiff.

The following said plaintiff's exhibits are admitted in evidence:

5, letter

3, contract

Third Party Defendant Hartford Accident & Indemnity Company's exhibit A, copy of letter, is admitted in evidence.

Harold Ashton is sworn and cross-examined on behalf of said plaintiff.

The following said plaintiff's exhibits are admitted in evidence:

6, contract

7, contract

And thereupon, at 12:00 noon, It Is Ordered that the further trial of this case is continued to 1:30 P.M., this date, to which time counsel are excused.

Subsequently, at 1:30 P.M., all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff Armeo Drainage & Metal Products, Inc.'s Case Continued:

Counsel for the defendant Pioneer Constructors are given permission to withdraw from the Courtroom during the proceedings, the trial to continue in the absence of representation for said defendant.

Harold Ashton, heretofore sworn, is recalled and further cross-examined on behalf of said plaintiff.

Plaintiff Apache Powder Company's Exhibit 1, photostatic copy of letter, is admitted in evidence.



W. T. Melder is sworn and examined on behalf of the plaintiff Armco Drainage & Metal Products, Inc.

Said plaintiff's Exhibit 8, delivery receipt, is admitted in evidence.

Whereupon, the plaintiff Armco Drainage & Metal Products, Inc., rests.

#### Plaintiff Apache Powder Company's Case:

Melvin J. Simmons is sworn and examined on behalf of the plaintiff Apache Powder Company.

The following exhibits of the Third Party Defendant Hartford Accident and Indemnity Company are admitted in evidence:

B, Statement dated November 30, 1956, invoice, bills of lading

C, Statement dated December 31, 1956, invoices

D, Statement dated January 31, 1956, invoices, bills of lading

E, Statement dated March 31, 1957, invoices, bills of lading

F, Copy of check

G, Copy of check

H, Copy of check

I, Remittance dated February 12, 1957

J, Invoice dated December 10, 1956

K, Remittance copy, check copy, acknowledgments

Plaintiff Apache Powder Company's Exhibit 2, copy of letter and monthly statement, is admitted in evidence.

Robert Henderson is sworn and examined on behalf of the plaintiff Apache Powder Company.

Thereupon, at 4:40 P.M., It Is Ordered that the further trial of this case is continued to Wednesday, March 5, 1958, at 9:30 A.M., to which time all counsel are excused.

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[Title of District Court and Causes.]

MINUTE ENTRY OF WEDNESDAY,  
MARCH 5, 1958

November 1957 Term (Tucson Division) at Tucson.  
Honorable James A. Walsh, United States District  
Judge, Presiding.

All counsel being present pursuant to recess,  
further proceedings of trial are had as follows:

Plaintiff Apache Powder Company's Case Continued:

Robert Henderson, heretofore sworn, is recalled and further examined on behalf of the plaintiff Apache Powder Company.

Said plaintiff's exhibits are admitted in evidence:

3, delivery orders

4, bills of lading

5, copies of statements to Pioneer Constructors

6, claim of Apache Powder Company

7A, receipt

7B, receipt

7C, receipt

8, credit memorandum

9, credit memorandum

10, envelope

11a, remittance slip

11b, remittance slip

11c, remittance slip and 5 invoices

The following exhibits of the defendant Ashton Company are admitted in evidence:

A, statement of account and letter of transmittal

B, copy of letter dated April 12, 1957

Paul Nagley is sworn and examined on behalf of the plaintiff Apache Powder Company.

And thereupon, at 12:00 noon, It Is Ordered that the further trial of this case is continued to 1:30 P.M., this date, to which time counsel are excused.

Subsequently, at 1:30 P.M., all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff Apache Powder Company's Case Continued:

Paul Nagley, heretofore sworn, is further examined on behalf of the plaintiff Apache Powder Company.

The following witnesses are sworn and examined on behalf of the plaintiff Apache Powder Company:

J. L. Smazal

Amos J. Browning

Whereupon, the plaintiff Apache Powder Company rests.

The plaintiff Apache Powder Company requests leave to amend the Amended Complaint, and

It Is Ordered that the plaintiff Apache Powder Company is granted leave to amend the Amended Complaint in respect to the date of the sub-contract with the defendant Construction Materials Company and the termination of the sub-contract of the defendant Pioneer Constructors; i.e., January 8, 1957.

Counsel for Hartford Accident and Indemnity Company moves on behalf of the Third Party Defendant for judgment against the plaintiffs Armco Drainage and Metal Products, Inc., and Apache Powder Company. Counsel for the defendant Ashton-Mardian Company joins in said motion.

The Court reserves its ruling on said motion.

Third Party Defendant Hartford Accident and Indemnity Company's case:

Paul Swaggerty is sworn and examined on behalf of the Third Party Defendant.

Whereupon, Third Party Defendant Hartford Accident and Indemnity Company rests.

Counsel for Hartford Accident and Indemnity Company renews Third Party Defendant's motion for judgment against the plaintiffs.

Counsel for the plaintiff Armco Drainage and Metal Products Company, Inc., moves for judgment on its complaint.

It Is Ordered that the motion for judgment against the defendant Pioneer Constructors, the prime contractor, and Travelers Indemnity Company is granted.

Counsel for the plaintiff Apache Powder Com-



pany moves for judgment on its complaint. The Court reserves ruling thereon.

The plaintiff Armco Drainage and Metal Products Company will prepare Findings of Fact, Conclusions of Law and Judgment.

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[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,  
MARCH 6, 1958

November 1957 Term (Tucson Division) at Tucson  
Honorable James A. Walsh, United States District  
Judge, Presiding.

The Court finds, inter alia, as follows:

Late in October, 1956, Pioneer and Construction Materials began negotiations between them looking to arrangements whereunder Construction Materials would replace Pioneer as the subcontractor on the Ajo job as of November 1, 1956.

In the last half of November, 1956, the prime contractor on the Ajo job agreed to terminate Pioneer's subcontract and to give Construction Materials a subcontract for all work remaining unperformed by Pioneer on November 1, 1956, provided that arrangements satisfactory to the prime contractor could be made for subcontractor bonding.

On January 8, 1957, the Pioneer subcontract was formally terminated and a new subcontract was entered into between the prime contractor and Construction Materials.

On December 4, 1956, in the expectation that the



termination of Pioneer's subcontract and the entry of Construction Materials into a subcontract would soon thereafter be formally accomplished, Construction Materials caused Apache to be notified that all materials thereafter supplied or delivered by Apache to the Ajo job were to be billed to Construction Materials.

That at the time such notice was given to Apache, Pioneer was indebted to Apache in the sum of approximately \$21,000.00 for materials supplied and delivered by Apache to the Ajo job prior to November 1, 1956.

That Apache ignored the notice given to it by Construction Materials and continued to bill Pioneer for the materials it furnished to the Ajo job after December 4, 1956, including in its statements Pioneer's unpaid balance as well as charges for materials ordered from Apache by Construction Materials after December 4, 1956.

That Pioneer's agents or employees delivered Apache's statements to Construction Materials and that Construction Materials paid Apache for the materials delivered by Apache to the Ajo job after November 1, 1956, but made no payment on the balance owing from Pioneer for materials delivered prior to November 1, 1956; that in making payments to Apache, Construction Materials used checks imprinted "Construction Materials Co., Construction Division"; that the vouchers accompanying Construction Materials check specified the numbers of the invoices for which the checks were tendered in payment and noted significantly that such

invoices had been "Billed to Pioneer" by Apache.

That after December 4, 1956, and not later than January 8, 1957, Apache had knowledge and information which would have lead a reasonably prudent person in the same situation to make an investigation of the subcontract situation on the Ajo job and the relationship of Pioneer and Construction Materials thereto; that if it had made such investigation, Apache would readily have learned not later than January 8, 1957, that all materials which it furnished to the Ajo job after December 4, 1956, had been ordered by Construction Materials, received by Construction Materials, and used by Construction Materials on the Ajo job and that Pioneer had not ordered, or received, or used any of the materials furnished by Apache since December 4, 1956; that Apache would have learned that Pioneer had, in fact, ceased to do any work on the Ajo job on October 31, 1956, and that all work done on the Ajo job thereafter had been done by Construction Materials. That Apache failed to make any reasonable effort, in the circumstances, to ascertain the facts regarding the subcontract situation and the relationship of Pioneer and Construction Materials thereto. That Apache did not act with ordinary prudence in protecting its rights as against the prime contractor and his surety.

That no written notice pursuant to 40 U.S.C., Section 270b(a) was given by Apache to the prime contractor until April 25, 1957, when Apache gave notice to the prime contractor by registered mail that it claimed a balance of \$20,900.69 for materials

furnished or supplied by it on the Ajo job to Pioneer Constructors and Construction Materials Company.

That all materials furnished or supplied by Apache to Construction Materials for use in the Ajo job were paid for by Construction Materials.

That the written notice required by 40 U.S.C., Section 270b(a) was not given by Apache to the prime contractor on the Ajo job within 90 days from the date on which Apache furnished or supplied the last of the materials to Pioneer.

That plaintiff is entitled to judgment on the first count of its amended complaint herein against defendant Pioneer for the sum of \$18,947.96, with interest at the rate of 6% per annum from November 1, 1956, until paid, and for plaintiff's costs of suit.

That defendants Ashton, Mardian, Ashton-Mardian Company, and Travelers are entitled to judgment against plaintiff on the first count of the amended complaint that plaintiff take nothing by said first count from said defendants, or any of them, and that said defendants have their costs of suit.

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[Title of District Court and Cause.]

## PROPOSED ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes Now the plaintiff, United States of America, for the Use of Apache Powder Company, a corporation, and proposes the following

additions to the Findings of Fact and Conclusions of Law submitted herein by defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, to-wit:

### Findings of Fact

11(a). That the last of the material furnished by plaintiff Apache Powder Company on the aforesaid Ajo radar station job, prior to January 8, 1957, the date when the subcontract of defendant Pioneer Constructors was formally terminated and a new subcontract formally entered into between Ashton-Mardian Company and Construction Materials Company, was on December 20, 1956; and the last of the material furnished by plaintiff Apache Powder Company on the aforesaid Ajo job was furnished on March 12, 1957.

18(a). That on March 19, 1957, plaintiff Apache Powder Company gave oral notice to defendant Ashton-Mardian Company that plaintiff claimed a balance of \$25,312.60 for explosives and blasting supplies furnished by it prior to that date on the aforesaid Ajo radar station job to defendants Pioneer Constructors and Construction Materials Company.

### Conclusions of Law

3(a). That the oral notice given by plaintiff Apache Powder Company to defendant Ashton-Mardian Company on March 19, 1957, was given



within ninety (90) days from the date on which plaintiff Apache Powder Company furnished the last of the materials to defendant Pioneer Constructors for which claim is made but did not comply with the requirements of Act of Congress of August 24, 1935, c. 642 Sec. 2, 49 Stat. 794, 40 U.S.C.A. Sec. 270(b).

EVANS, KITCHEL & JENCKES,  
/s/ By ALFRED B. CARR,  
Attorneys for Plaintiff.

Notice of Mailing Attached.

[Endorsed]: Lodged March 21, 1958.

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[Title of District Court and Cause.]

## OBJECTIONS TO PROPOSED ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in joint venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, and third party defendant and object to the proposed additions to the findings of fact and conclusions of law submitted by the plaintiff for the following reasons:

### I.

Object to proposed finding of fact 11(a) for the reason that said finding is immaterial as the evi-

dence shows that the new subcontractor Construction Materials Company was on the job on December 20, 1956, and that plaintiff had notice of said fact before said date, namely on December 4, 1956, and that any delivery of material subsequent to December 4, 1956, was necessarily made to Construction Materials Company.

II.

Object to proposed finding of fact 18(a) and conclusion of law 3(a) for the reason that said finding and conclusion are immaterial since oral notice does not comply with the Miller Act.

III.

Further object to conclusion of law 3 (a) for the reason that the oral notice on March 19, 1957, was not within 90 days from the date on which plaintiff furnished the last of the materials to defendant Pioneer Constructors which would necessarily have been prior to December 4, 1956.

HALL, CATLIN & JONES,

/s/ By HAMILTON R. CATLIN,

Attorneys for Defendants The Ashton Company, Inc., Mardian Construction Co., Ashton-Mardian Co., and The Travelers Indemnity Company.

CONNER & JONES,

/s/ By A. O. JOHNSON,

Attorneys for Hartford Accident and Indemnity Company.

Notice of Mailing Attached.

[Endorsed]: Filed March 20, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,  
MARCH 21, 1958

November 1957 Term (Tucson Division) at Tucson.  
Honorable James A. Walsh, United States District  
Judge, Presiding.

The Court approves, settles, signs and files the Findings of Fact and Conclusions of Law proposed by the prime contractor and in addition the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

The last of the material furnished by plaintiff Apache Powder Company on the Ajo radar station job was furnished on March 12, 1957.

That on March 19, 1957, Apache Powder Company gave oral notice to defendant Ashton-Mardian Company that Apache claimed a balance of approximately \$25,000.00 for explosives and blasting supplies furnished by it prior to that date on the Ajo radar station job to defendant Pioneer Constructors.

Conclusion of Law

That the oral notice given by Apache Powder Company to defendant Ashton-Mardian Company on March 19, 1957, did not comply with the requirements of Act of Congress of August 24, 1935, c. 642 Sec. 2, 49 Stat. 794, 40 U.S.C.A. Sec. 270(b).

The Court signs and files the Judgment which is entered herein.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial before the Court, sitting without a jury, on March 4, and 5, 1958, on the issues raised by the First Count of plaintiff's complaint and the answers thereto, and the Court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the Court for decision and the Court being fully advised in the premises now makes its Findings of Fact as follows:

### Findings of Fact

1. This action was brought under the Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b.

2. Apache Powder Company is a New Jersey corporation, authorized to do business in the State of Arizona; The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, are Arizona corporations engaged in a joint venture as Ashton-Mardian Company; The Travelers Indemnity Company is a Connecticut corporation, authorized to do business in the State of Arizona; Pioneer Constructors is an Arizona corporation.

3. On or about March 30, 1956, the defendants, The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and



Mardian Construction Company, engaged in a joint venture as Ashton-Mardian Company, did enter into a contract in writing with the United States of America, Corps of Engineers, United States Army, wherein it was agreed that said defendants were to furnish the material and perform the work for the construction and completion of Air Force Station TM-181, a radar station five miles north of Ajo, Pima County, Arizona, in accordance with plans and specifications and terms and conditions therein specifically set forth.

4. On or about March 30, 1956, pursuant to Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270a, and pursuant to the terms of the aforesaid contract, said defendant Ashton-Mardian Company, a joint venture, as principal and said defendant The Travelers Indemnity Company as surety, made, executed and delivered to the United States of America their payment bond as required by said Act of Congress.

5. On or about March 30, 1956, said defendants Ashton-Mardian Company, a joint venture, as prime contractor on said contract with the United States of America, entered into a subcontract with the defendant Pioneer Constructors, a corporation, for the performance and completion of certain parts of the work specified in said subcontract, which were to be performed and completed under said contract with the United States of America in accordance with the plans and specifications and terms and conditions of said prime contract.

6. That defendant Ashton-Mardian Company, as the prime contractor, and defendant Pioneer Constructors, as a subcontractor under said contract with the United States of America, entered upon the performance of said prime contract and subcontract and did furnish labor and materials therefor.

7. That the plaintiff Apache Powder Company did furnish materials to the subcontractor, Pioneer Constructors, from June 13, 1956, to and including the 31st day of October, 1956, at the special instance and request of the defendant Pioneer Constructors of a reasonable value of \$20,900.39.

8. That late in the month of October, 1956, Pioneer Constructors and Construction Materials Company, an Arizona corporation, began negotiations between themselves looking to arrangements whereunder Construction Materials Company would replace Pioneer Constructors as the subcontractor on the aforesaid job as of November 1, 1956.

9. That in the last half of November, 1956, defendant Ashton-Mardian Company agreed to terminate Pioneer Constructors' subcontract and to give Construction Materials Company a subcontract for all work remaining unperformed by Pioneer Constructors under its subcontract on November 1, 1956, provided that arrangements satisfactory to the defendant Ashton-Mardian Company could be made for subcontractor bonding.

10. That defendant Pioneer Constructors ceased the doing of any work on the aforesaid job on

October 31, 1956, and Construction Materials Company did perform all work encompassed under the Pioneer Constructors' subcontract done on and after November 1, 1956.

11. That on January 8, 1957, the subcontract of the defendant Pioneer Constructors was formally terminated and a new subcontract entered into between the defendant Ashton-Mardian Company, as prime contractor, and Construction Materials Company, as subcontractor, which subcontract encompassed all work under Pioneer Constructors' subcontract not completed on November 1, 1956.

12. On December 4, 1956, in the expectation that the defendant Pioneer Constructors' subcontract and the entry of Construction Materials Company into a subcontract would soon thereafter be formally accomplished, Construction Materials Company caused the plaintiff Apache Powder Company to be notified that all materials thereafter supplied or delivered by plaintiff Apache Powder Company to the aforesaid job were to be billed to Construction Materials Company.

13. That at the time such notice was given to plaintiff Apache Powder Company, defendant Pioneer Constructors was indebted to plaintiff Apache Powder Company in the sum of \$20,900.39, for materials supplied and delivered by plaintiff Apache Powder Company to the aforesaid job prior to November 1, 1956.

14. That plaintiff Apache Powder Company ignored the notice given to it by Construction Mate-

rials Company and continued to bill defendant Pioneer Constructors for the material furnished to the aforesaid job after December 4, 1956, including in its statement Pioneer Constructors' unpaid balance, as well as charges for materials ordered from plaintiff Apache Powder Company by Construction Materials Company after December 4, 1956.

15. That thereafter defendant Pioneer Constructors' agents or employees delivered plaintiff Apache Powder Company's statements to Construction Materials Company and that Construction Materials Company paid plaintiff Apache Powder Company for the materials delivered by plaintiff Apache Powder Company to the aforesaid job after November 1, 1956, but made no payment on the balance owing from Pioneer Constructors for materials delivered prior to November 1, 1956; that in making payments to plaintiff Apache Powder Company, Construction Materials Company used checks imprinted "Construction Materials Company, Construction Division"; that the vouchers accompanying Construction Materials Company's checks specified the numbers of the invoices for which the checks were tendered in payment and noted thereon that such invoices had been "billed to Pioneer" Constructors by Apache Powder Company.

16. That after December 4, 1956, and not later than January 8, 1957, plaintiff Apache Powder Company had knowledge and information which would have led a reasonably prudent person in the



same situation to make an investigation of the subcontract situation on the aforesaid job and the relationship of Pioneer Constructors and Construction Materials Company thereto; that if it had made such investigation, plaintiff Apache Powder Company would readily have learned not later than January 8, 1957, that all materials which it furnished to the aforesaid job after December 4, 1956, had been ordered by Construction Materials Company, received by Construction Materials Company, and used by Construction Materials Company on the aforesaid job and that defendant Pioneer Constructors had not ordered or received or used any of the materials furnished by plaintiff Apache Powder Company since December 4, 1956; that plaintiff Apache Powder Company would have learned that defendant Pioneer Constructors had in fact ceased to do any work on the aforesaid job on October 31, 1956, and that all work done on the aforesaid job thereafter had been done by Construction Materials Company.

17. That plaintiff Apache Powder Company failed to make any reasonable effort under the circumstances to ascertain the facts regarding the subcontract situation and the relationship of Pioneer Constructors and Construction Materials Company thereto; that plaintiff Apache Powder Company did not act with ordinary prudence in protecting its rights as against the prime contractor and its surety.

18. That no written notice pursuant to Act of

Congress of August 24, 1935, c. 642 § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a) was given by plaintiff Apache Powder Company to the defendant Ashton-Mardian Company until April 25, 1957, when plaintiff Apache Powder Company gave notice to defendant Ashton-Mardian Company, by registered mail, that it claimed a balance of \$20,900.39 for materials furnished or supplied by it on the aforesaid job to Pioneer Constructors and Construction Materials Company.

19. That all materials furnished or supplied by plaintiff Apache Powder Company to Construction Materials Company for use on the aforesaid job were paid for by Construction Materials Company.

20. That there remains due and owing from the defendant Pioneer Constructors to plaintiff Apache Powder Company after the allowance of all credits and offsets the sum of \$18,947.96, with interest at the rate of six per cent per annum from November 1, 1956, until paid.

From the foregoing facts the Court concludes:

#### Conclusions of Law

1. That the Court has jurisdiction over the foregoing action and all parties thereto.

2. That plaintiff Apache Powder Company, a corporation, had direct contractual relationship with the defendant Pioneer Constructors, a corporation, but did not have any contractual relationship, either express or implied, with the defendant Ashton-Mardian Company, a joint ven-

ture composed of The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, a corporation, and Mardian Construction Company, a corporation.

3. That the written notice given by the plaintiff Apache Powder Company to the defendant Ashton-Mardian Company on April 25, 1957, was not given by said plaintiff to said defendant within ninety days from the date on which the plaintiff Apache Powder Company furnished and supplied the last of the materials to defendant Pioneer Constructors for which claim is made and thus did not comply with the requirements of Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a).

4. That the plaintiff Apache Powder Company is entitled to judgment against the defendant Pioneer Constructors on the First Count of its Amended Complaint for the sum of \$18,947.96, with interest at the rate of six per cent per annum from November 1, 1956, until paid and for its costs of suit.

5. That the plaintiff Apache Powder Company is not entitled to judgment against the defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, a corporation, and Mardian Construction Company, a corporation, Ashton-Mardian Company, a joint venture, and The Travelers Indemnity Company, a corporation, or any of them under the First Count of its Amended Complaint, and that said

defendants are entitled to judgment against the plaintiff for their costs of suit.

Let judgment be entered accordingly.

Dated this 21st day of March, 1958.

/s/ JAMES A. WALSH,  
Judge of the District Court.

Notice of Mailing Attached.

[Endorsed]: Filed March 21, 1958.

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In The District Court of the United States  
In and For The District of Arizona

No. Civ.—967 Tuc.

UNITED STATES OF AMERICA, for the Use  
of APACHE POWDER COMPANY, a corporation,  
Plaintiff,  
vs.

THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, formerly ASHTON BUILDING COMPANY, and MARDIAN CONSTRUCTION COMPANY, corporations engaged in Joint Venture as ASHTON-MARDIAN COMPANY; THE TRAVELERS INDEMNITY COMPANY, a corporation; PIONEER CONSTRUCTORS, a corporation; and CONSTRUCTION MATERIALS COMPANY, a corporation,  
Defendants.



THE ASHTON COMPANY, INC., CONTRACTORS AND ENGINEERS, an Arizona corporation, and MARDIAN CONSTRUCTION COMPANY, an Arizona corporation, dba ASHTON-MARDIAN COMPANY, a joint venture,  
Third Party Plaintiffs,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,  
Third Party Defendant.

### JUDGMENT

This cause came on regularly for trial before the Court, sitting without a jury, on March 4 and 5, 1958, on the issues raised by the First Count of Plaintiff's Complaint and the answers thereto, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and the findings aforesaid:

It Is Ordered, Adjudged and Decreed:

1. That the plaintiff Apache Powder Company, a corporation, have judgment on the First Count of its Amended Complaint herein against defendant Pioneer Constructors, a corporation, for the sum of \$18,947.96, with interest at the rate of six

per cent per annum from November 1, 1956, until paid and for its costs of suit.

2. That defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, have judgment against the plaintiff on the First Count of plaintiff's Amended Complaint; that plaintiff take nothing by said First Count from said defendants or any of them and that said defendants have their costs of suit.

Done In Open Court this 21st day of March, 1958.

/s/ JAMES A. WALSH,

Judge of the District Court.

[Endorsed]: Filed March 21, 1958.

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[Title of District Court and Cause.]

### CIVIL DOCKET ENTRY

\* \* \* \* \*

1958

Mar. 21—38. Enter and file judgment lodged with the Court on Mar. 13, 1958, in favor of pltf. United States of America, for the Use of Apache Powder Company, a corporation, on the First Count of its Amended Complaint and against deft. Pioneer Constructors, a corp., in the sum

1958

Mar. 21 of \$18,947.96 with 6% int. per annum  
(Cont.) from Nov. 1, 1956, until paid and for its costs of suit; in favor of defts. The Ashton Company, Inc., Contractors and Engineers, and Mardian Construction Company, dba Ashton-Mardian Company, a joint venture, and The Travelers Indemnity Company, a corp., against the pltf., United States of America, for the Use of Apache Powder Company, a corp., on the First Count of Pltf's Amended Complaint; that pltf. take nothing by said First Count from said defts. or any of them and that said defts. have their costs of suit. (Docketed 3/24/58.)

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[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,  
APRIL 3, 1958

November 1957 Term (Tucson Division) at Tucson.  
Honorable James A. Walsh, United States District  
Judge, Presiding.

Pursuant to the provisions of Rule 54(b), Federal Rules of Civil Procedure, the Court determines that there is no just reason for delay in entering judgment upon the claim made by the First Count of plaintiff's amended complaint. Accordingly, the Clerk is directed, pursuant to Rule 54(b), to forthwith enter judgment that the use plaintiff

have judgment on the First Count of its amended complaint against defendant Pioneer Constructors for the sum of \$18,947.96 with interest at 6% per annum from November 1, 1956, until paid and for costs; and further judgment that defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and the Travelers Indemnity Company, a corporation, have judgment against the plaintiff on the First Count of plaintiff's Amended Complaint, that plaintiff take nothing by said First Count from said defendants or any of them and that said defendants have their costs of suit.

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[Title of District Court and Cause.]

### CIVIL DOCKET ENTRY

Date 1958

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Apr. 3—Enter judgment in favor of pltf. USA ex rel Apache Powder Company, a corp. on the First Count of its amended complaint against deft. Pioneer Constructors for the sum of \$18,947.96 with int. at 6% per annum from Nov. 1, 1956 until paid and for costs; and ent. fur. judgment in favor of defts. The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corpora-



1958

Apr. 3 tions engaged in Joint Venture as Ash-  
(Cont.) ton-Mardian Company, and The Travel-  
ers Indemnity Company, a corp. against  
ptlf. USA ex rel Apache Powder Com-  
pany on First Count of ptlf's Amended  
Complaint, that ptlf. take nothing by said  
First Count from said defts. or any of  
them and that said defts. have their costs  
of suit.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Apache Powder Company, a corporation, the use plaintiff above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part of the final judgment entered herein on the 24th day of March, 1958, against Apache Powder Company, a corporation, the use plaintiff herein, and in favor of The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in a Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, defendants herein.

EVANS, KITCHEL & JENCKES,  
/s/ By ALFRED B. CARR,  
Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

## BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Apache Powder Company, a New Jersey corporation, authorized to do business in the State of Arizona, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at Phoenix, Arizona, as Surety, are held and firmly bound unto The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in a Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, in the sum of Two Hundred Fifty Dollars (\$250.-00), lawful money of the United States of America, to be paid to the said Ashton-Mardian Company and The Travelers Indemnity Company, their successors or assigns, for which payment well and truly to be made and done we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of April, 1958.

Whereas, the aforesaid Principal is filing notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part of the judgment of the District Court of the United States for the Tucson Division of the

Judicial District of Arizona, entered on the 24th day of March, 1958, against the said Principal and in favor of said Ashton-Mardian Company and The Travelers Indemnity Company in the above-entitled action.

Now The Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellant Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

APACHE POWDER COMPANY,

/s/ By ALFRED B. CARR,

Its Attorney.

[Seal] FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND,

/s/ By (Illegible),

Attorney-in-Fact.

[Endorsed]: Filed April 16, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Apache Powder Company, a corporation, the use plaintiff above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part of the preliminary judgment entered herein on the 24th day of March, 1958, and from that part of the final judgment entered herein on the 3rd day of April, 1958, against Apache Powder Company, a corporation, the use plaintiff

herein, and in favor of The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in a Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, defendants herein.

EVANS, KITCHEL & JENCKES,

/s/ By ALFRED B. CARR,

Attorneys for Plaintiff.

[Endorsed]: Filed April 28, 1958.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Apache Powder Company, a New Jersey corporation, authorized to do business in the State of Arizona, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at Phoenix, Arizona, as Surety, are held and firmly bound unto The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in a Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, in the sum of Two Hundred Fifty Dollars (\$250.-00), lawful money of the United States of America, to be paid to the said Ashton-Mardian Company and The Travelers Indemnity Company, their



successors or assigns, for which payment well and truly to be made and done we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of April, 1958.

Whereas, the aforesaid Principal is filing notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part of the preliminary judgment of the District Court of the United States for the Tucson Division of the Judicial District of Arizona, entered on the 24th day of March, 1958, and from that part of the final judgment of said District Court entered herein on the 3rd day of April, 1958, against the said Principal and in favor of said Ashton-Mardian Company and The Travelers Indemnity Company in the above entitled action.

Now The Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

APACHE POWDER COMPANY,

/s/ By ALFRED B. CARR,

Its Attorney.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

/s/ By RALPH A. CASH,

Attorney-in-Fact.

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of the said Court, including the records in the case of United States of America, for the Use of Apache Powder Company, a corporation, Plaintiff, versus The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, et al., Defendants, numbered Civ. 967 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute and civil docket entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute and docket entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Complaint

2. Answer of Defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company

3. Motion for More Definite Statement by third party defendant, Hartford Accident and Indemnity Company

4. Plaintiff's Response to Third Party Defendant's Motion for More Definite Statement

5. Answer of Defendant, Pioneer Constructors, a corporation

6. Answer of Third Party Defendant to Plaintiff's Complaint

7. Answer of Defendant, The Travelers Indemnity Company, a corporation

8. Transcript of Pre-trial Conference

9. Minute entry of January 30, 1958 (pre-trial conference)

10. Minute entry of February 28, 1958 (order granting leave to file amended complaint and for separate trials)

11. Amended complaint

12. Minute entry of March 4, 1958 (proceedings of trial)

13. Minute entry of March 5, 1958 (further proceedings of trial)

14. Minute entry of March 6, 1958 (decision)

15. Proposed Additions to Findings of Fact and Conclusions of Law

16. Objections to Proposed Additions to Findings of Fact and Conclusions of Law filed by de-

endants Ashton-Mardian Company and the Travelers Indemnity Company.

17. Minute entry of March 21, 1958 (settling findings of fact and conclusions of law and making additional findings of fact and conclusions of law)

18. Findings of Fact and Conclusions of Law

19. Judgment

20. Civil Docket Entry of Judgment of March 21, 1958

21. Civil Docket Entry of Judgment of April 3, 1958

22. Minute entry of April 3, 1958 for entry of judgment upon claim made by First Count of Amended Complaint

23. Notice of Appeal to Court of Appeals from judgment entered March 24, 1958

24. Plaintiff's Bond for Costs on Appeal relating to appeal from judgment entered March 24, 1958

25. Plaintiff's Notice of Appeal to Court of Appeals from preliminary judgment entered March 24, 1958, and final judgment entered April 3, 1958

26. Plaintiff's Bond for Costs on Appeal relating to appeal from preliminary judgment entered March 24, 1958 and final judgment entered April 3, 1958

27. Transcript of Proceedings

28. Designation of Contents of Record on Appeal.

I further certify that all original exhibits in evidence, or marked for identification, as desig-



nated by the appellant, are transmitted herewith as a part of this record on appeal, to-wit:

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7A, 7B, 7C, 8, 9, 10, 11A, 11B and 11C in evidence.

Third Party Defendant's Exhibits A, B, C, D, E, F, G, H, I, J and K in evidence.

Defendant Ashton's exhibits A and B in evidence.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$5.20, and that said sum has been paid by counsel for the appellant.

Witness my hand and the seal of said Court this 16th day of June, 1958.

[Seal] WM. H. LOVELESS,  
Clerk,

/s/ By CATHERINE A. DOUGHERTY,  
Chief Deputy.

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[Title of District Court and Causes.]

## TRANSCRIPT OF PROCEEDINGS

Appearances: Messrs. McRae, Elliott & Thompson, by Mr. John L. Elliott, and Mr. Howard Thompson, for Plaintiff Armeo Drainage & Metal Products. Messrs. Evans, Hill, Kitchel & Jenckes, by Mr. Alfred B. Carr, and Mr. Ralph Lester, for Plaintiff Apache Powder Company. Messrs Fickett & Dunipace, by Mr. Fred W. Fickett, for Pioneer Constructors. Messrs. Hall, Catlin & Jones, by Mr. Hamilton R. Catlin, for Third Party De-

fendant Ashton-Mardian Company. Messrs. Boyle, Bilby, Thompson & Shoenhair, by Mr. Wilbert E. Dolph, Jr., for Construction Materials Company. Messrs. Conner & Jones, by Mr. A. O. Johnson, for Third Party Defendant, Hartford Accident & Indemnity Company.

The Above Entitled Matter came up for trial on the 4th day of March, 1958, at the hour of 10:00 o'clock A.M. at Tucson, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit: [5]\*

(The cases were called by the Clerk.)

The Court: Are the parties all ready?

(All parties indicating ready for trial.)

Mr. Johnson: We are ready, your Honor. Before proceeding for trial, we filed a motion to amend our answer, which is noticed for hearing next Monday, I believe. I think it should be ruled on now.

The Court: I will pass on it when I see what the evidence is. The reference that you make to the deposition in your motion, I don't believe that would support an amendment, if that is all you are basing it on.

Mr. Johnson: That is the question, your Honor.

The Court: The motion for leave to amend the answer, if that is the basis of it, what is referred to in the answers to the interrogatories?

Mr. Johnson: The answers to the interrogatories and also some similar information came out

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\* Page numbers appearing at top of page of Reporter's Transcript of Record.

in the deposition, and the evidence will also show it.

The Court: As I interpret that, it was something that happened after the materials had been furnished.

Mr. Johnson: That is right, your Honor.

The Court: The motion of the third party defendant to amend its answer in 966, the answer to complaint in 966 and the answer to the third party complaint in 966, is denied.

Mr. Dolph: Your Honor, I am appearing here on behalf [6] of Construction Materials Company, which is apparently not involved in the first count of the amended complaint in Case No. 967, and is not involved at all in the other case to go to trial today. We want to make sure the record was clear on our understanding that the second count of the amended complaint in which our client is involved is not to go to trial now and we will not be bound by the evidence in the trial of the other issues that are to be tried at this time.

The Court: That is correct. The issues made by the second count in 967 and the answer that may be filed thereto will be tried separately.

Mr. Dolph: Thank you, your Honor.

The Court: You may proceed, Mr. Thompson.

Mr. Thompson: If the Court please, prior to calling our first witness, I believe the Court is well aware of the fact that a pre-trial conference was held in this matter. As I understand it, the record of that pre-trial conference has been filed and is now a part of the record. I don't know whether

it requires a motion or not, but if it does I would like to move the Court to consider that pre-trial conference and the stipulations made therein as a part of this trial record.

The Court: Any objection to that?

Mr. Johnson: No objection.

Mr. Catlin: No objection. [7]

Mr. Carr: No objection.

The Court: The record may show the record of the pre-trial conference held in these cases on January 30th, 1958, which record was filed in this cause on February 19, 1958, is incorporated as a part of the record of this trial.

Mr. Thompson: Thank you, your Honor. One other item in that regard. During the pre-trial conference counsel for Armco Drainage & Metal Products Company asked for stipulation of the other counsel on the materials which were delivered on the job on December 13th, 1956. Mr. Johnson, representing Hartford, said that he would verify whether or not those materials were actually used on the job, and he advised me and the other counsel advised me at that time that they would so stipulate as to the Armco materials actually being used on the job, unless they notified me prior to trial; and I will avow to the Court at this time that no notice was given to me of those materials not being used on the job, so I am assuming then it is stipulated that the Armco materials were actually used on the job in question.

Mr. Johnson: Our information is to that effect, your Honor.

Mr. Thompson: I will call Mr. D. G. Putnam.



## D. G. PUTNAM

called as a witness herein, having been first duly sworn, [8] testified as follows:

## Direct Examination

Q. (By Mr. Thompson): Mr. Putnam, for the record, will you state your name, please?

A. Donald G. Putnam.

Q. Mr. Putnam, what is your occupation?

A. I am a civil engineer for the Corps of Engineers.

Q. Calling your attention to the early part of 1956, were you the project engineer on the United States Army Air Force Project TM-181 at Ajo, Arizona for the Corps of Engineers?

A. Yes, sir.

Q. In your capacity as the project engineer for the United States Corps of Engineers, do you officially deal with the prime contractor or the subcontractors on the job?

A. The prime contractor.

Q. In that regard is there any requirement requiring the prime contractor to furnish you a list of its subcontractors on the job?

A. There is a section of the contract specifications entitled General Conditions that require the submission of subcontractors' names upon request.

Q. Was that in the prime contract in this particular job?

Mr. Catlin: If it will help, we will stipulate that [9] provision is in the general contract, rather than have you go through it.

(Testimony of D. G. Putnam.)

Mr. Thompson: All right.

Q. (By Mr. Thompson): Then, Mr. Putnam, since it has been stipulated that there is a requirement that the prime contractor must furnish you as the representative of the Corps of Engineers a list of its subcontractors on the project, pursuant to request, did you make a request for such a list?

A. I did.

Q. And was such a list furnished you?

A. It was.

Q. And by whom was the list furnished to you?

A. Ashton-Mardian Company.

Q. And Ashton-Mardian is the joint venture that had the prime contract on that job, was the one that had the contract with the United States Government on the job?      A. Yes, sir.

Q. In reference to that list was the Pioneer Constructors listed on there as a subcontractor?

A. Yes, sir.

Mr. Johnson: At this time I think the record should show an objection to the question. I think the list itself would be the best evidence.

Q. (By Mr. Thompson): Mr. Putnam did you bring a copy of the list with you? [10]

A. Yes, sir.

Q. You were subpoenaed to bring it, were you not?      A. Yes, sir.

(Plaintiff Armco's Exhibit 1 marked for identification.)

Q. (By Mr. Thompson): Mr. Putnam, I hand you a list marked Plaintiff's Exhibit 1 for identifi-

(Testimony of D. G. Putnam.)

cation and ask you if that is a signed carbon copy of the list which was furnished you by Ashton-Mardian Company pursuant to a request for a list of subcontractors?      A. Yes, sir.

Q. And what is the date that appears thereon?

A. 25th of September, 1956.

Mr. Thompson: We offer this in evidence at this time, your Honor.

Mr. Johnson: We object to the offer on the grounds of immateriality. All this evidence does is show the Pioneer Constructors was a subcontractor on September 25th, 1956, which I believe is admitted by all the pleadings. The offer is entirely incompetent and immaterial for any other purpose.

The Court: Is this preliminary, Mr. Thompson?

Mr. Thompson: Yes, it is, your Honor.

The Court: I will receive it for that purpose.

(Plaintiff Armco's Exhibit 1 marked in evidence.)

The Court: It will be marked Plaintiff Armco's Exhibit 1 in evidence. [11]

Q. (By Mr. Thompson): Mr. Putnam, under the regulation which appears in the specifications, doesn't that provide that if a different subcontractor comes on the job or one is substituted or one leaves that you are to be furnished that information?

Mr. Johnson: We object to that on the ground I think the contract itself is the best evidence of what that provides.

Q. (By Mr. Thompson): Mr. Putnam, you are

(Testimony of D. G. Putnam.)

familiar with the regulations of the United States Government in reference to the duties of a prime contractor on a United States project, are you not?

A. Yes, sir.

Q. Is there a regulation which requires the prime contractor to keep the representative of the United States Government informed as to the subcontractors that are doing work on the project?

Mr. Johnson: If the Court please, we object on the ground the regulation itself should be offered if it is material, rather than the recollection of this witness.

The Court: The regulation would be the best evidence.

The Witness: I don't see it in there.

Q. (By Mr. Thompson): Mr. Putnam, do you know what that regulation is that we have been discussing here?

Mr. Fickett: Same objection, if the Court please.

The Court: What regulation are you talking about, [12] Mr. Thompson?

Mr. Thompson: I am asking him about the regulation requiring the prime contractor to furnish a list of subcontractors.

The Court: There is no evidence of any such regulation. Let's get the regulations if there are any.

Mr. Thompson: They are supposed to be a part of that particular contract. However, that is apparently just a portion of the actual job specifications on it. They were included in the copy which Mr.



(Testimony of D. G. Putnam.)

Putnam has, which constitutes the entire contract. And I assumed that those would be in there, but they are not. We checked it the other day and saw that those regulations were a part of that particular contract.

The Court: You are not bound by this contract. If the actual contract has those in there, get the actual contract.

Q. (By Mr. Thompson): You didn't bring the contract with you?

A. No, I brought a copy of this letter; it quotes the contract.

Q. I see.

A. Which I wrote to the prime contractor.

Q. All right.

Mr. Thompson: We had a stipulation that there was a regulation or requirement that the prime contractor had [13] to furnish a list of its subcontractors to the project engineer, did we not?

Mr. Catlin: Yes.

Mr. Johnson: On demand?

Mr. Thompson: On demand, right.

Mr. Catlin: On request.

Q. (By Mr. Thompson): Now, Mr. Putnam, pursuant to that regulation which we have just mentioned in the stipulation here, did you request a list of the subcontractors from the Ashton-Mardian Company?      A. Yes, sir.

Q. How was that request made?

A. By letter.

Q. Did you bring a copy of that letter with you?

(Testimony of D. G. Putnam.)

A. Yes, sir.

Q. When you wrote this letter was it sent to the Ashton-Mardian Company?

A. It was sent—I don't remember the exact address. I have it here.

Q. Was it sent to the Ashton Company and the Mardian Company?

A. Ashton Building Company, Mardian Construction Company.

Q. The original of that letter then was mailed to Ashton-Mardian, is that correct?

A. Yes, sir. [14]

Q. And addressed as indicated on your copy of it?

A. Yes, sir.

Q. And when was this request or this letter written?

A. The 21st of April, 1956.

Q. You wrote the letter, did you not?

A. Yes, sir.

(Plaintiff Armco's Exhibit 2 marked for identification.)

Mr. Fickett: Your Honor, may it be an order for us to request that the contract that the witness looked at be marked for identification at this time, just to keep the record. He made some remarks about it, not being able to find something in it.

The Court: Do you want to have that marked as Plaintiff Armco's 3 for identification?

Mr. Thompson: Yes.

(Plaintiff Armco's Exhibit 3 marked for identification.)

(Testimony of D. G. Putnam.)

A. There is a possibility that might be in there, I didn't search that thoroughly, I didn't find it.

Mr. Thompson: I offer Plaintiff's 2 in evidence.

The Court: Any objection to 2 for identification?

Mr. Johnson: I make an objection at this time to the exhibit and the entire line of testimony, for *their* reason it is immaterial and does not tend to prove or disprove any of the issues in this case. All it could prove is that Ashton-Mardian did or did not notify the Government as to [15] whether or not a certain subcontractor was on the job, which we contend is completely immaterial.

The Court: The objection is overruled. It may be received.

(Plaintiff Armco's Exhibit 2 marked in evidence.)

Q. (By Mr. Thompson): Mr. Putnam, in reference to Plaintiff's Exhibit 2 in evidence, did you advise the Ashton Company and the Mardian Company, the joint venture in this case, of the regulations pertaining to keeping you advised as to the subcontractors on the job?

Mr. Fickett: We object to that, if your Honor please. The letter is there, speaks for itself. Whatever it is, it is.

The Court: Is that what you are getting at, is the letter?

Mr. Thompson: Yes.

The Court: The letter would show what he told him.

Q. (By Mr. Thompson): All right. Mr. Put-

(Testimony of D. G. Putnam.)

nam, as the United States project engineer on the Air Force Station job, were you ever advised that Construction Materials was a subcontractor on that job?

Mr. Johnson: Let the record show the same objection.

The Court: The objection is overruled.

A. I don't remember of having been officially notified.

Q. (By Mr. Thompson): In other words, your official [16] records indicate no reference to Construction Materials, is that right?

A. That is right.

Mr. Johnson: I object. And let the record show the records themselves were introduced.

The Court: The record is the best evidence.

Q. (By Mr. Thompson): Mr. Putnam, as the United States project engineer on the job in question, calling your attention to approximately the 1st of November, 1956, was there any interruption in the work schedule on the job which had been contracted for by the Pioneer Construction Company?

A. None that I remember.

Q. Do you recall whether or not the same supervisory personnel was used on that road construction job during the entire period that it was under construction, that is, aside from a normal change?

A. I believe so, yes, sir.

Q. Did you at any time observe or see a mass exodus of employees off of that job?

A. None other than a normal interruption.



(Testimony of D. G. Putnam.)

Q. And did you see any change in construction equipment other than changes that resulted normally from the progress of the work as it progressed? A. No, sir.

Q. Then from your observation was there anything that [17] would indicate to you or to a person simply from observing the working of the men, the equipment, supervisory personnel, that would indicate to anyone that there was a change in subcontractors on that road construction job during any particular period of time while that road was under construction? A. No, sir.

Mr. Thompson: That is all.

#### Cross Examination

Q. (By Mr. Catlin): Mr. Putnam——

The Court: Pardon me, Mr. Catlin. I suggest you let the plaintiffs go ahead first. Do you have any questions, Mr. Carr?

Mr. Carr: If the Court please, it is my understanding that all testimony of all witnesses, whether for Armco or Apache becomes a part of the record in both cases.

The Court: That is right.

Mr. Carr: So it is not necessary to go over the——

The Court: No. We would be here forever.

Mr. Catlin: Do I understand, your Honor, that is the way you would like to proceed, to have both the plaintiffs question each witness?

The Court: In that way we won't be going back

(Testimony of D. G. Putnam.)

and forth. In other words, if Mr. Thompson should have overlooked [18] anything or if he didn't develop something Mr. Carr thought should be brought out, then all of the witnesses' testimony on direct would be in for cross examination.

Mr. Catlin: There is no question about the fact that myself as representing the prime contractor and Mr. Johnson as representing the third party defendant will both be able to question the witnesses also, is there? I say that in view of the other ramifications that are in this case.

The Court: I am going to be liberal to Mr. Johnson in his questions because he has a stake in the matter.

#### Cross Examination

Q. (By Mr. Catlin): Mr. Putnam, I notice part of this letter which is marked Plaintiff Armco's Exhibit No. 2, the provision that payrolls are to be submitted with the proper affidavit, both by the prime and the subcontractors, is that correct?

A. That is correct, yes, sir.

Q. Was that done in this particular case?

A. To the best of my knowledge it was.

Q. Do you know whether or not the Pioneer submitted their certified payrolls?

A. I am satisfied they did, yes, sir.

Q. Do you know whether Construction Material submitted certified payrolls to you through your office? [19]

A. They submitted payrolls; I don't remember back to 1956 any particular instance.

(Testimony of D. G. Putnam.)

Q. You don't remember whether or not that the payroll submitted by Construction Materials started with any particular date, is that correct?

A. That is correct, yes, sir.

Q. Then with the submission of those payrolls you were aware that Construction Materials was on the job?

A. I would be, yes, sir.

Q. Your answers then to Mr. Thompson that you were not aware of any change would be modified by the fact that you had received payrolls from Construction Materials?

A. I personally don't see those payrolls.

Q. Do they go through your office?

A. Yes, sir.

Mr. Catlin: I have no further questions.

### Cross Examination

Q. (By Mr. Johnson): I believe you stated in answer to a question that counsel asked that you were never officially notified that Construction Materials was a subcontractor on that job; I take it you were then unofficially notified?

A. I don't remember of having been officially notified and I don't remember how I was notified.

Q. But you were notified some way, it was called to your attention that Construction Materials was a subcontractor on the job, is that correct?

A. I don't remember if I heard it in town or on the job.

Q. Anyway you did hear it?

A. I knew they were on the job, yes, sir.

(Testimony of D. G. Putnam.)

Q. Can you tell us when it was you first knew that?      A. No, sir.

Q. Did you make any request or demand then of Ashton-Mardian to furnish you with that official information?

A. Not above and beyond the original request.

Q. In other words, you didn't take their failure to notify you very seriously then?      A. No, sir.

Q. One more question. It isn't the custom of the subcontractors or prime contractor to furnish you a list of the materialmen from whom the subcontractor is purchasing material, is it?

A. Not the material people. They furnish us drawings and equipment lists for approvals.

Mr. Johnson: That is all.

Mr. Carr: I am sorry, I didn't get that.

The Witness: They furnish shop drawings and equipment for approval as required by the contract specifications. Various sections of the specifications require these lists [21] be furnished.

### Redirect Examination

Q. (By Mr. Carr): In this case were the estimates of Apache Powder Company submitted by Pioneer or Ashton-Mardian?

A. I don't believe so, sir. That is material that has not been incorporated into the work and wouldn't require approval.

Mr. Carr: That is all.

(Witness excused.) [22]

\* \* \* \* \*



## GERARD JOHN STURM

called as a witness herein, having been first duly sworn, testified as follows: [30]

\* \* \* \* \*

## Cross Examination \* \* \* \* \*

Q. (By Mr. Johnson): You mentioned a gentleman named Jim in this letter.

A. Jim Ammon, right. I didn't read it to refresh my memory, but Jim Ammon was hired to cover the southern part of the State when we took Bill Johnson and brought him up north. At that time Jim Ammon was in the southern part of the State, which included Tucson. I met him and went out to Pioneer's office, to Mr. Skorpick's office and discussed the account, which that letter relates.

Q. What was said by you and by Mr. Skorpick on that occasion in regard to the Ajo account?

A. It is covered in the paragraph and I think it is indicated he was going to pay it.

Q. Was anything said in that conversation in regard to who was, or who was not the subcontractor on the Ajo job at that time?

A. Absolutely not.

Q. Was Construction Materials Company mentioned? A. Not in any way.

Q. Are you familiar with the shipment which was made by your company to the Ajo job during the month of December? A. Yes.

Q. Who ordered that shipment to be made?

A. I did.

Q. And who on the job out there asked you to have it done? [43]

(Testimony of Gerard John Sturm.)

A. Well, there wasn't anybody on the job. My trip on December 14th was the result of having tried to get ahold of Mr. Skorpick in relation to the account, and I called him on December 10th.

Q. You called who?

A. Mr. Skorpick. December 10th was a Monday and the 14th was Friday. I tried to call Mr. Skorpick at his office in Tucson from our office in Phoenix and he was not in. And Mel Simmons usually in there and I talked to him about the account because we had talked to him about the account before and his never being able to give us any money. So I talked to Mel at that time. It was requested the shipment was short these materials that we shipped on the 13th from L.A.

Q. Isn't it true, Mr. Sturm, on that occasion Mr. Simmons advised you that the Construction Materials Company had taken over the job and at that time was subcontractor on the job?

A. Absolutely not.

Q. Isn't it true that Mr. Simmons told you the Pioneer Constructors were no longer on the job?

A. No, sir.

Q. You are positive that neither of those statements were made by Mr. Simmons?

A. Positive. The first information I ever had was the day as a result of that telegram.

Mr. Johnson: Mark this for identification, please. [44]

\* \* \* \* \*

## HAROLD ASHTON

called as a witness herein, having been first duly sworn, testified as follows:

## Cross Examination

Q. (By Mr. Thompson): State your name, please.      A. Harold Ashton.

Q. Mr. Ashton, do you have any connection with the Ashton Company? [50]

A. I am the president of that company.

Q. That is the same company that formed the joint venture with the Mardian Construction Company on this Air Force project TM-181 at Ajo, Arizona?      A. That is right.

Q. The two companies were the joint venturers which had the prime contract with the United States Government on that job, is that right?

A. Right.

Q. Mr. Ashton, as president of the Ashton Company and as a part of this joint venture, isn't it true that the detail of contracts and things related to negotiations, and so on, were carried on primarily by you for the Ashton-Mardian Company in relation to that job? I am contrasting that as to the Mardian Company in that respect.

A. I would say that is right.

Q. Now, as the prime contractor on that job, the Ashton-Mardian Company, you entered into a contract with the Pioneer Constructors, the Pioneer Construction Company, for a portion of the work under the prime contract, did you not?

A. That is right.

(Testimony of Harold Ashton.)

Q. And that contract is dated, was dated March 30, 1956? A. You mean our prime contract?

Q. No, I am speaking of the subcontract between yourself and the Pioneer Constructors. [51]

Mr. Catlin: Those are part of the records.

The Court: They are in the envelope there.

Q. (By Mr. Thompson): Now, in regard to your entering into a contract with Pioneer Constructors, did you take bids on the portion of the work that was covered in that particular contract, call for bids on it?

A. We did not call for bids on it; some bids were submitted to us.

Q. Do you recall approximately how many bids were submitted covering the work that is covering in your Pioneer subcontract?

A. To my knowledge we didn't receive another bid that covered all the items that were covered in this contract. However, combination of other bidders would have totaled the same units of work.

Q. Well, you entered into the contract with Pioneer Constructors because, if I understand correctly, at that particular time you believe that was to the best advantage of the Ashton-Mardian Company, is that right? A. That is right.

Mr. Thompson: What was the stipulation in regard to these, they were true copies?

Mr. Catlin: As I understand it was stipulated they could be received in evidence.

Mr. Thompson: That is what I understood. Will you [52] mark these in evidence?



(Testimony of Harold Ashton.)

The Court: They may be received.

(Plaintiff Armco's Exhibits 6 and 7 marked in evidence.)

Mr. Thompson: For counsel, the Pioneer Constructors' contract is Armco 6; Construction Materials' contract is Armco's 7.

Q. (By Mr. Thompson): Mr. Ashton, I have handed you Armco's Exhibit 6 in evidence, being a subcontract executed between your company and Pioneer Constructors, and ask you in relationship to that particular contract, on the first page of it, this was your subcontract agreement number 7, is that right, the number being indicated in the upper right hand corner? A. That is right.

Q. And the second sheet there is entitled: "Supplemental Sheet to Subcontract No. 7," Is that right? A. That is right.

Q. In reference to the items that appear on your first part of it there, are those sections of the specifications referred to in the prime contract?

A. That is right.

Q. And then as a general statement the items that are listed on your supplemental sheet, subcontract No. 7, being the second page of this subcontract, are those the items required to carry out the provisions of the specifications [53] listed on the first page there?

A. The sections listed on the first page are the governing specifications for the performance of the work listed on the second.

Q. This subcontract, as I understand it, applied

(Testimony of Harold Ashton.)

principally to the construction of the roadway on the Ajo job, is that right?      A. That is right.

Q. There is some building excavation included I believe in here, but the principal portion of it is the roadway, is that right?      A. That is right.

Q. And in reference to the negotiations pertaining to the actual execution of Armco's No. 7 in evidence, what was the personnel you dealt with, or who were they you dealt with on behalf of Pioneer Constructors?

A. I dealt with Mr. Skorpick and Mr. Moore.

Q. Mr. Skorpick was president of Pioneer Constructors?      A. That is right.

Q. And Mr. Moore vice president?

A. Right.

Q. Do you recall, Mr. Ashton, in reference to the pipe which is listed under bid items on the second page of the Pioneer contract, Armco's No. 7 in evidence, do you recall whether or not the Ashton-Mardian Company paid Pioneer for [54] the major part of the pipe listed there?

A. To my knowledge we did.

Q. This contract is dated March 30, 1956. Do you recall whether or not it was actually executed on that date?

A. I don't believe that it was executed on that date.

Q. Do you know approximately when it was executed?

The Court: When you speak of "this contract", what do you mean, Mr. Thompson, what number?

(Testimony of Harold Ashton.)

Mr. Thompson: I am speaking of Armco No. 7 in evidence, the Pioneer Constructors'.

The Court: That is 6. I think you referred to it several times as 7. It should be 6.

Mr. Thompson: Let the record show that I have referred to nothing except Armco's No. 6 in evidence, being the Pioneer Constructors' contract, up to this point.

The Court: By that you mean you have intended to refer to it?

Mr. Thompson: I have attempted to, yes. I am getting confused, because the contract has the number 7 on it.

Q. (By Mr. Thompson): In reference to Armco's No. 6 in evidence, being the Pioneer Constructors' contract, I believe I asked you, do you recall approximately when it was executed; did you answer that question?

A. I believe I did and I believe I said I wasn't certain when it was executed. It was written at this date and it may [55] not have been finally executed until the performance bonds were executed.

Q. I see.

Do you recall when the performance bond was executed?

A. I don't recall the date, but we have a copy of the bond and it is dated.

Q. That was, in any event, some time after the date of March 30, 1956? A. That is right.

Q. As a practical matter, in the execution of Armco No. 6 in evidence, was this contract typed

(Testimony of Harold Ashton.)

up at the Ashton-Mardian Company offices? In other words, did you prepare——

A. To my best knowledge this contract was typed up at the Tucson office, because on March 30th we had not as yet established an office at the project.

Q. That is the Tucson offices of the Ashton-Mardian Company?      A. That is right.

Q. In the execution of the contract would you, on behalf of the Ashton-Mardian Company, sign the contract prior to the time the subcontractor signed it?      A. Not ordinarily.

Q. Do you recall in this case, referring to the Pioneer Constructors' contract, who signed it first?

A. I don't recall, but I assume Mr. Skorpick would have [56] signed it first.

Q. And your normal procedure would be it would be signed by him and returned to you, or would it be done in your presence?

A. No, it would be signed by him and returned to me with a copy of the bond, and at that time I would sign it or my authorized representative of the company would sign it.

Q. Then as a practical matter you didn't sign your subcontracts until you got the executed copies back from the subcontractor and a copy of his performance bond?      A. That is right.

Q. Mr. Ashton, I now hand you Plaintiff Armco's Exhibit No. 7 in evidence, and ask you in reference to that contract, it is dated November 1, 1956, I believe, is it not?      A. That is right.



(Testimony of Harold Ashton.)

Q. That particular contract, being Armco No. 7 in evidence, is I believe your subcontract agreement No. 128, is that correct? A. That is correct.

Q. And in reference to Armco No. 7 in evidence, the Construction Materials' contract, do you recall whether or not the Ashton Company approached the Construction Materials Company or representative of the Construction Materials Company approached the Ashton Company in the negotiation of this contract? [57]

A. The Construction Materials—well, let me say Mr. Skorpick and Mr. Moore approached the Ashton Company.

Q. This is the same Mr. Skorpick and Mr. Moore you have previously named as being president and vice president of the Pioneer Constructors, is that correct? A. That is right.

Q. Do you recall approximately when they approached you?

A. I can't recall the exact day, but to the best of my knowledge it was during the latter part of November of 1956.

Q. When you say the latter part, are you speaking of, say, the last week of November or last ten days?

A. I would say it would be the last half of November.

Q. In other words, as I understand your testimony, you weren't even approached on this contract, which is dated November 1, 1956, until at least fifteen days after that date, is that right?

(Testimony of Harold Ashton.)

A. I would say that is right.

Q. And you were approached by Mr. Skorpick and Mr. Moore, I believe you said?

A. That is right.

Q. At that particular time did you know Mr. Skorpick and Mr. Moore had an interest in Pioneer Constructors Company?

A. I had every reason to believe that they did.

Q. Did you know whether they had a large or small interest, or what? [58]

A. To the best of my knowledge, it was a small interest.

Q. They were not the majority stockholders then? A. Pardon?

Q. They were not the majority stockholders, as you understand it?

A. As I understood it they weren't.

Q. In reference to the Construction Materials Company, did you know whether or not Mr. Skorpick or Mr. Moore had an interest in that company?

A. They told me they did.

Q. What did they tell you?

A. They told me they had a majority interest in that company.

Q. Did they tell you they owned the company?

A. I don't remember that specifically.

Q. But they had a majority interest in the company? A. They controlled the company.

Q. They controlled the company. What reason did they give you for asking you at this time to

(Testimony of Harold Ashton.)

enter into a subcontract with the Construction Materials Company?

A. The reason they gave me was the fact that for some time they had been trying to make a deal with the majority stockholders and Pioneer Constructors to liquidate that company, or to buy them out and that it was agreeable with Pioneer Constructors, it was agreeable with the surety [59] company and it was agreeable with them they assume the balance of the work required to be done on this particular project. It was to their advantage to make this change; it was not to our advantage to keep them from making the change. We were dealing with the same people who had originally entered into a contract with us and we had the same surety company as agreed to protect us and we saw no reason to not make the change, as it was desirable to them.

Q. As I understand it, they advised you that Pioneer Constructors wanted to liquidate, is that right, or wanted to get out of the construction business?

A. Well, whether they wanted to get out of the construction business or liquidate, I don't recall if they specifically said that in so many words. The main element of the case being the fact that they wanted to get out of it.

Q. You mean Mr. Skorpick and Mr. Moore wanted to get out of the Pioneer Constructors Company?

A. That is right.

Q. Had you dealt with any other representatives

(Testimony of Harold Ashton.)

of the Pioneer Constructors up to this time aside—— A. No, I hadn't.

Q. I mean as officers as such? A. No.

Q. Were you approached, during this period of time were you approached by anyone other than Mr. Skorpick and Mr. Moore, [60] who purported to represent Pioneer Constructors?

A. I was not.

Q. Then as I understand it, Mr. Skorpick and Mr. Moore came to you, they at that time represented Pioneer Constructors, and advised you they wanted to get out of that company, but at the same time as majority stockholders of the Construction Materials Company they wanted to take over this subcontract which had originally been entered into between your company and Pioneer Constructors, is that a fair statement?

A. I don't know whether that is a fair statement or not. I can't, as I sit here, determine if they came to me as representatives of Pioneer trying to get out of the situation, or representatives of Construction Materials trying to get into one.

Q. At the time they approached you in the latter part of November, you couldn't tell, is that right?

A. That is right. I would say that is right.

Q. Aside from whom they represented in the statement, getting out of one company and coming in as Construction Materials Company and taking over this particular subcontract, eliminating that element, it is correct, isn't it?

A. I believe that is correct.



(Testimony of Harold Ashton.)

Q. Mr. Ashton, I believe the provisions on the back of your first page of your contract, just with Pioneer Constructors, Armco's No. 6 in evidence, provides that you can require the [61] subcontractor to furnish you with receipts for labor and materials at the time this purported change took place between Pioneer and Construction Materials, did you require those? A. We did not.

Q. The reason you didn't of course was that they had a bond protecting you in that regard?

A. I think that was one of the reasons; and the other was we had no reason to believe there were any outstanding bills due.

Q. You weren't advised of outstanding obligations of Pioneer Company at that time?

A. We were not.

Q. Now, Mr. Ashton, in comparing the two contracts, that is, Armco No. 6 in evidence and Armco No. 7 in evidence, aside from the fact that a different date appears on the first page and a different company is named, the amount of money being different, these contracts refer to the same specifications of the prime contract, do they not?

A. That is right.

Q. Now, on page 2 of Armco's No. 6 and No. 7 in evidence, in comparing those two, they relate to the same work required to meet those specifications, items that are listed on page 1, do they not?

A. They refer to the balance of the work required to [62] complete them.

Q. In other words, the Construction Materials'

(Testimony of Harold Ashton.)

contract, Armco 7 in evidence, covers the balance of the work of the Pioneer Constructors' contract, is that right?      A. Repeat that, please.

Q. The Construction Materials' contract, Armco No. 7 in evidence, covers the balance of the work as of November 1, 1956?      A. That is correct.

Q. Of the Pioneer Constructors' contract is that correct?      A. That is correct.

The Court: It is 12:00 o'clock. We will recess until 1:30.

(Whereupon a recess was taken at 12:00 o'clock noon until 1:30 o'clock p.m.) [63]

Afternoon Session, 1:30 o'clock p.m.

March 4, 1958

Mr. Fickett: Your Honor, I may want to be excused during the afternoon. I would like the record to show that we have no objection to the trial going on in any of its stages, whether Pioneer is represented by counsel or not.

The Court: Very well. The record may show that counsel for Pioneer is given permission to withdraw at any time. The trial will proceed in the absence of Pioneer's counsel.

Mr. Carr: I wonder if I can ask counsel for Pioneer where Mr. Skorpick is, if he knows? I understand the subpoena duces tecum has been issued and the Marshal has been unable to serve him over a period of several days and know whether or not Mr. Skorpick knew of the trial on this day and where he is.

Mr. Fickett: I know nothing, because Pioneer and Skorpick have nothing to do with each other at the present time and I do not represent Mr. Skorpick or Construction Materials. He is president of Construction Materials Company and I have absolutely nothing to do with that insofar as any representation is concerned. [64]

### HAROLD ASHTON

having been previously sworn, resumed the stand and testified further as follows:

#### Cross Examination—(Continued)

Q. (By Mr. Thompson): Mr. Ashton, in comparing these two contracts, that is the Armco No. 7 in evidence, the Construction Materials Company contract and Armco No. 6 in evidence, the Pioneer Constructors' contract, on the supplemental sheet which is the second page of the contract, do you have those before you?      A. No.

Q. I believe you previously testified that the Pioneer Constructors' contract was your subcontract agreement No. 7, did you not?

A. That's right.

Q. You also testified that your subcontract agreement No. 128 was the Construction Materials' contract, did you not?      A. That's right.

Q. In comparing these two contracts, I notice that your supplement sheet, subcontract No. 7, which is the second page of the Pioneer Constructors' contract, Armco No. 6 in evidence, contains

(Testimony of Harold Ashton.)

the identifying line at the top, supplement sheet to [65] subcontract No. 7, isn't that right?

A. That's right.

Q. Then referring to the Construction Materials' contract, Armco No. 7 in evidence, your subcontract No. 128, that same identifying line, supplemental sheet to subcontract No. 7, appears on the Construction Materials' contract, does it not?

A. Yes, it does.

Q. Then it is clearly apparent from the evidence that these two contracts related to the same subcontract on the Air Force Job, isn't that right?

Mr. Johnson: If the Court please, I object to that as calling for a conclusion of the witness. It is pretty clearly in evidence that there are two subcontracts.

The Court: Objection sustained.

Q. (By Mr. Thompson): It is clearly apparent that they relate to the same work on the Air Force Job aside from the fact that a portion has already been completed by Pioneer by the time the second subcontract was signed?

A. I wouldn't say that. I think this probably in error. I think probably that when this second contract was drafted, the engineer that handed it to the typist probably made an error and on this Construction Materials' contract, that probably should have said, "supplemental sheet to subcontract No. 128," but it was being copied off this same sheet only [66] with different quantities and probably the typist just failed to note that. I hadn't noted it before.



(Testimony of Harold Ashton.)

Q. I believe you had testified that these two contracts related to the same work?

A. There is no question about that.

Q. Mr. Ashton, in regard to the two contracts which we are discussing, I notice the Pioneer contract was for a sum in the amount of \$401,217.83, isn't that correct?      A. That is correct.

Q. The Construction Materials' contract is for the amount of \$266,391.66, isn't that correct?

A. That's right.

Q. As far as the Ashton-Mardian Company was concerned, does that \$266,000.00 on the Construction Materials' contract represent the balance of the \$401,000 of the Pioneer subcontract?

A. That's right.

Q. Mr. Ashton, calling your attention to the period of approximately November 1, 1956, was there any change in personnel on the road construction work on the Ajo contract other than what would normally occur in construction work?

A. Not to my knowledge.

Q. Was there any change in the supervisory personnel?

A. No change due to this change.

Q. Let me ask you in regard to equipment. On the road [67] construction equipment that was being used there, was the same equipment continued in use under the second subcontract as was used under the first except what would normally be not used because of the progress of the work?

A. To my knowledge it was.

(Testimony of Harold Ashton.)

Q. In other words, there was no mass turn over of equipment there? A. I don't believe so.

Q. In regard to the equipment used on the job, was the equipment marked with the Pioneer Constructors' name on it?

A. Some units had that name on it.

Q. Did the Pioneer Constructors' name appear on the equipment throughout the course of the work?

Mr. Johnson: At this time, your Honor, let the record show an objection to the questions as to the names on the equipment for the reason it is highly immaterial. I think the evidence is that the plaintiff's representatives had their negotiations in the Tucson office and by phone anyway. So there is no theory they could have been misled by the markings on the equipment.

The Court: He may answer.

Q. (By Mr. Thompson): Did the Pioneer Constructors' name appear on the equipment, let us say through the month of December, 1956?

A. To my knowledge it did. [68]

Q. To your knowledge did any of the road equipment, was it marked with the name Construction Materials Company?

A. This is during December?

Q. Yes, up through December, 1956.

A. I just can't remember that. There were some few pieces of equipment that came on the job I think before the end that did have the name Con-

(Testimony of Harold Ashton.)

struction Materials Company on them, but I can't remember what they were or when they arrived.

Q. When you say before the end, are you referring to the end of the road construction or the end of December?

A. The end of the road construction.

Q. Do you recall whether or not that equipment came on the job before the end of December or after the end of December?

A. You mean some equipment with Construction Materials' name on it?

Q. Yes.

A. As I recollect, it was after the first of the year.

Q. As a result of the execution of the second subcontract on this job, was there any interruption in the construction schedule on the roadway?

A. No interruption.

Q. It continued right on without interruption then?      A. That's right. [69]

Q. Calling your attention to the negotiations leading up to the execution of the Construction Materials' contract, which is Armco No. 7 in evidence, I believe you previously testified that you were first approached in regard to negotiating a new contract there the latter part of November, 1956, is that right?      A. That's right.

Q. And at that time you were approached by Mr. J. E. Skorpick and Tom Moore, is that right?

A. That's right.

(Testimony of Harold Ashton.)

Q. I believe you previously testified that they were the president and vice president of Pioneer Constructors Company?      A. That's right.

Q. And also of Construction Materials Company?      A. That's right.

Q. In reference to their advising you that they wanted to take over as Construction Materials Company the work of the Pioneer Constructors on this job, you previously testified you didn't see any disadvantage to Ashton-Mardian in taking it over since it would continue the same personnel and equipment and so on. What did you advise Mr. Skorpick and Mr. Moore in regard to that?

A. I discussed this thing with the other principals and advised him if he wanted to take this course we would have to establish a severance date of some kind which would necessarily [70] have to be the end of a given thirty-day period because that is the only time any quality analysis is provided or available, and it was our feeling that he would have to provide a surety bond preferably from the same people that wrote the original bond to Pioneer Constructors for the performance of the balance of the work.

Q. That would be so there would be no lapse from the bond already on Pioneer Constructors and beginning a new bond for Construction Materials, is that correct?      A. That is correct.

Q. Did you advise them, did you agree the latter part of November that if the bond was secured that upon a contract being executed, that it would relate



(Testimony of Harold Ashton.)

back to November 1, 1956 or did you select the date at that time?

A. I can't remember just in what discussion we had, I mean what discussion the date was determined, whether it was at this first discussion, I mean as soon as this issue became a fact, why, a great amount of conversation was continuously going on probably on a daily or every other day basis as to what we were going to do and what date would be the cut off date, and I would say that in subsequent discussions from some time prior to the 1st of December probably, we decided on this October 31st date.

Q. Then since a new contract was executed, I assume that the new bond was obtained, is that right? [71]

A. That's right.

Q. Do you know approximately when that bond was obtained?

A. The final bond, according to the information I think we have, was obtained January 8th, wasn't it?

Q. Of 1957?

A. Of 1957.

Q. Then if I recall, or isn't this a fact, that you received the copy of the bond and the contract back executed sometime around the 1st of the year. This is the Construction Materials' contract I am speaking of.

A. It must have been somewhere around the 8th of January.

Q. Then when you received it back, you executed it, isn't that correct?

A. That is correct.

(Testimony of Harold Ashton.)

Q. That was around the 8th of January, 1957?

A. I believe that is correct.

Q. As I understand it in your discussions regarding the bond, this Construction Materials' contract was contingent upon the Construction Materials Company getting the bond, is that correct?

A. That is correct.

Q. In other words, if they had not obtained the bond on or about January 8th, 1957, Pioneer Constructors would have been continued on the job and responsible to you as a prime contractor? [72]

Mr. Johnson: Let the record show an objection to that question as calling for a conclusion stating facts not in evidence, that Pioneer Constructors would have continued on the job. I think the evidence is that Pioneer Constructors was off the job then and Construction Materials Company was on.

The Court: I think we should know that. I don't think there is any evidence either way, if they were or weren't. Was work going on from November 1 right up to January 8th?

The Witness: That is right.

The Court: There was no cessation of work?

The Witness: No.

The Court: But actually your contract with Construction Materials was entered into, I mean actually executed by you on January 8th or about that time?

The Witness: That's right.

The Court: Objection overruled.

(Testimony of Harold Ashton.)

The Witness: We would have had no other course to take. Evidence also proves the fact that by virtue of the fact that no payments were made to these people until such time as the new bond was furnished and the contract executed.

Q. (By Mr. Thompson): That is my next question. I was going to ask you if you recall approximately when your last payment was made to the Pioneer Constructors?

A. Mr. Catlin has that. The last payment was made to [73] Pioneer Constructors on the 26th day of November for work completed as of the 31st day of October, both 1956.

Q. When was the first payment made to Construction Materials Company?

A. The first payment was made January 24, 1957. It was January 29th, 1957.

Q. In other words, you made no payments to Construction Materials until after the contract was signed on January 8th, 1957?

A. That is correct.

Q. Mr. Ashton, do you recall the conversation between yourself and Jerry Sturm on March 11, 1957?      A. I do.

Q. At that time did Mr. Sturm advise you that Pioneer Constructors owed Armeo?

A. He did.

Q. The amount of \$16,411.84?      A. He did.

Q. At that time did you advise him that you would do all in your power to see they were paid?

A. I did.

(Testimony of Harold Ashton.)

Q. Out of the retention moneys? Did you say yes?

A. I did. I wouldn't specifically say out of the retention moneys. I would say all in my power to see they were paid. [74]

Q. Did you advise Mr. Sturm that there was bond coverage in effect which would protect Armco?

A. I did.

Q. During the course of that conversation did you explain to him or tell him that the Pioneer contract terminated on October 31, 1956 and a Construction Materials Company contract became effective on that job November 1, 1956?

A. I believe I did.

Q. Did you any time prior to that notify Armco of this change in subcontractors on that job?

A. I don't believe we did. I don't believe I did.

Mr. Thompson: That is all.

#### Cross Examination

Q. (By Mr. Carr): Mr. Ashton, this may in part be repetitious, but I don't believe the specific point was covered. You have been examined in regard to the subcontract to Pioneer of March 30, 1956 and the subcontract to Construction Materials which bears date of November 1, 1956. Have you at any time examined the face of these contracts to determine that work required to be done is identical as appears on the face of the contract?

A. We know that.



(Testimony of Harold Ashton.)

Q. It is you know it and it is identical?

A. It involves the same units of work on a continual basis [75] from a stopping point on.

Q. You previously explained that the reference on the first page was to the section numbers of the contract and the reference on the supplemental sheet was to bid items mentioned in the contract?

A. That's right. I said on the sections on the first page governing specifications for the performance of the work to be done, under these six items.

Q. In connection with these two subcontracts, the bid items were the same, were they?

A. They were the same.

Q. And the quantity items were different?

A. That's right.

Q. For the reason part of the work had been done? A. That's right.

Q. The unit prices were the same?

A. That's right.

Q. And, of course, the quantities multiplied by unit prices carried out would give different sums and give different totals? A. That's right.

Q. In your examination by Mr. Thompson I believe you made the statement, Mr. Ashton, that it would be to the advantage of Construction Materials Company to make the change. Will you explain that statement a little more in detail? [76]

A. Well, due to the fact that Skorpick and Moore were principal owners of Construction Materials Company and were desirous of severing

(Testimony of Harold Ashton.)

their relations with Pioneer Constructors, and apparently this being the only major project that was then under contract that had a large amount of work yet to be done, had a change of this type not been made at that time, their relations and their connection with Pioneer Constructors would then have had to be maintained for an indefinite period of time. I mean they would as of this date today still would have had interest in Pioneer Constructors that they would have had to contend with. And it was desirous as far as they were concerned to be able to sever the thing.

Q. At the time of these negotiations, Mr. Ashton, did you have any information as to the financial status of Pioneer Constructors?

A. We had no information.

Q. I ask you if you didn't say on your deposition that you knew within a couple of months after the March 30th subcontract that Pioneer was in bad financial condition?

A. I said I believed that, I had heard by rumor that there was a situation of this kind, but we had no way to base it on fact. We had no letter of any kind from anyone saying a bill had not been paid and we had no telephone calls from anyone I can remember that were concerned about this particular project or any of the work we had done with them. [77]

Q. Was there anything to indicate that the bills were being paid? A. Probably not.

Q. You actually did not make any investiga-

(Testimony of Harold Ashton.)

tions to determine whether Pioneer had paid to suppliers?

A. No, we made no investigation. I mean, after all, people like yourself know these people better than we do. You have been selling to them for years. I have no way of finding out as much as a vendor.

Q. Did you consider the matter of any concern to Ashton-Mardian?

A. I can't say I wouldn't consider anything a matter of no concern to Ashton-Mardian. Under the circumstances, we felt we were adequately protected with the surety bond, that it would protect us in case the bills were not paid.

Q. You were relying on your Hartford surety bond on the subcontract, is that correct?

A. I would say we were relying on it. No different than in our prime contract. The Government doesn't get a financial statement from us. If we give them a bond, they give us a contract.

Q. Are you now familiar with the provisions of the Miller Act?

A. I would say reasonably familiar.

Q. The Act in effect gives the subcontractor ninety days [78] within which to pay his bills, settle up with his suppliers and laborers before any action can be filed or anything can be done looking toward the collection of claims of the suppliers against him, doesn't it?

A. That is my understanding.

Q. During this ninety day period if Ashton-

(Testimony of Harold Ashton.)

Mardian continued to pay the subcontractor and the subcontractor did not pay the money to the supplier, using it for some other purpose, and the claim was filed by the supplier, you would be stopped under the payment bond to the Government, wouldn't you?      A. That is——

The Court: That is a legal question, Mr. Carr.

Mr. Catlin: We have no objection to his answering it.

The Court: I don't think it is going to get us anywhere.

Mr. Carr: My intent, your Honor, was to ask if he understood that, but we will let it go.

Q. (By Mr. Carr): Now, you were questioned in regard to the amount of the Construction Materials subcontract, 266,000 and odd dollars. How was that figure fixed, Mr. Ashton?

A. That was based upon the estimated percentages of completion and the estimated unit quantities of completed work as of October 31st, 1956.

Q. Who made those estimates to start with?

A. Our engineer made the estimates to start with, probably on or about the 25th of October. They were probably turned in to the resident engineer, Mr. Putnam's office on the 31st of October for their engineer to check, and to affirm as to correct quantities and processed for payment shortly thereafter.

Q. When you were negotiating for the Construction Materials' subcontract, this figure was the



(Testimony of Harold Ashton.)

last one you had with respect to completion of work?      A. That's right.

Q. And that figure, does it bear any relation whatsoever to the situation existing on January 8th, 1957 as to the completion of work?

A. No, I wouldn't say it does, because there had been a considerable amount of work done during the months of November and December.

Q. You were also questioned in regard to change in management, personnel, equipment and suppliers on this job after November 1, 1956. I believe you said there was no material change not due to change in the type of work performed. Was that a condition of your agreement with Skorpick and Moore to give them the subcontract to Construction Materials, a condition that the work proceed by the same management, personnel, equipment?

A. That wasn't a condition.

Q. In answer to a question by Mr. Thompson you said that if the Hartford bond on the Construction Materials contract had not been executed on January 8th, 1957, Pioneer would have been continued responsible on the job. Did you, in fact, hold Pioneer responsible on the job up to the time when you executed the Construction Materials contract, subcontract on January 8th, 1957?

Mr. Johnson: I object as conclusion of the witness. He can testify what he did, if that constitutes holding anyone responsible.

The Court: You mean he in his judgment believed that the contract of Pioneer was binding

(Testimony of Harold Ashton.)

and in effect until January 8th, 1957, is that what you mean?

Mr. Carr: The intent, your Honor, is this: To establish if possible that Ashton-Mardian Company actually held Pioneer responsible for this work until the moment the new contract was executed on January 8th, 1957.

The Court: He may answer that.

Mr. Carr: That is not a question of conclusion but of fact.

A. When you were dealing with the president and vice president of two separate corporations, both of which are the same people, you aren't splitting hairs quite as fine as you would be if you were getting into an entirely new [81] organization. Our agreement with Skorpick and Moore was that this contract would not, could not, be considered binding until such time as the new surety bond was issued to Construction Materials Company, and the only way we had of governing this thing was withholding of funds, which we did. Had that new bond not been issued, the chances are we would have had at that time to go back to Skorpick and Moore and say, "Here, we can't enter into this contract with you. You can't be bonded. And that was the stipulation under which we agreed to make this change."

Q. (By Mr. Carr): Mr. Ashton, in connection with the operation there at Ajo by Pioneer Constructors and/or Construction Materials, are you familiar with the name of Paul A. Swagerty?

(Testimony of Harold Ashton.)

A. I am.

Q. Who is he?

A. He was the general superintendent for Pioneer Constructors and for Construction Materials Company on the subcontract work done at that project.

Q. He began with Pioneer and continued with Construction Materials? A. That is correct.

Q. Who was West?

A. There was a man named West that was working in the capacity of labor foreman or powderman, something down there. [82]

Q. Does it refresh your recollection?

A. Bill West.

Q. Was he in charge of the drilling and blasting program? A. I believe he was.

Q. Was he in charge for Pioneer before November 1, 1956? A. Yes, he was.

Q. And for Construction Materials Company afterwards?

A. If I remember correctly he became ill on the job or injured or something. When that developed, I am not absolutely certain.

Q. Do you know a man by the name of Thomas J. Dietzman? A. I do.

Q. What is his job?

A. If my memory is correct, I understood he went down there to work somewhat in the capacity of a grade foreman, but whether he actually did that or not, I don't know. He is an equipment operator, an operating engineer.

(Testimony of Harold Ashton.)

Q. Did he work for Pioneer?

A. I believe he worked for Pioneer.

Q. And continued to work when Construction Materials took over the job?

A. I just can't answer that last question. I don't know for sure if he was there that long or not, but I know he was on the job when the job started.

Q. H. Creswell. Do you know who he is? [83]

A. I know an H. Creswell.

Q. Was he working on this Ajo job?

A. I don't believe he was.

Q. Who was he employed by?

A. He was employed by Construction Materials Company as their, I understand, I think he still works in the same capacity; he is managing their ready-mix concrete delivery operation.

Q. Do you know Leo Traffin?

A. No, I don't.

Q. L. L. Witt?

A. I don't know him. I do not.

Mr. Catlin: Do you have many more?

Mr. Carr: I think that is about all the names.

Q. (By Mr. Carr): Bill Knight?

A. I don't know him.

Q. B. Taylor Wilkie?

A. I know Mr. Wilkie.

Q. What position did he hold with what company?

A. To my knowledge he was the—he worked in the capacity of equipment repair and parts expeditor in the shop for Pioneer Constructors.



(Testimony of Harold Ashton.)

Q. Did he ever work for Construction Materials?

A. I imagine that he has because they share the same shop, but I don't know just who was paying him. [84]

Q. Now, Mr. Ashton, do you recall a telephone conversation with me acting as attorney for Apache Powder Company on March 19, 1957?

A. I recall a telephone conversation with you, but I don't recall the date.

Q. Do you recall that I told you that the Pioneer owed Apache money for the job at Ajo and we discussed the matter and told you that I had called Mr. Mardian and Mr. Mardian had suggested my talking with you?

A. I believe I recall that.

Q. Do you recall that after discussing the matter with me you requested that I talk to Mr. Catlin, the Ashton-Mardian attorney?

A. I believe that's right.

Q. Would you say, Mr. Ashton, that the telephone conversation wasn't held on March 19, 1957?

A. I would not say it wasn't, no.

Q. In that conversation do you recall whether or not I told you that Pioneer Constructors owed Apache Powder Company \$25,312.60 for explosives and blasting supplies delivered at Ajo and used at Ajo and that was the balance due at the time?

A. I don't remember specifically the amount. I remember it was in the \$20,000 figure.

Mr. Carr: May we have this marked for identification, please? [85]

(Testimony of Harold Ashton.)

(Plaintiff Apache's Exhibit No. 1 marked for identification.)

Q. (By Mr. Carr): Mr. Ashton, I hand you Plaintiff Apache's Exhibit No. 1 for identification which appears to be a photostatic copy of a letter from Mardian Construction Company to you dated March 19, 1957. Kindly examine it and state whether or not you recall receiving that letter from Mr. Mardian.

A. I received this letter. It has our stamp right on it.

Q. Ashton Building Company was the former name of the Ashton Company, Contractors and Engineers?

A. That's right.

Mr. Carr: We offer this in evidence.

Mr. Johnson: No objection for admitting it for what it is worth. If it be offered as a notice under the Miller Act, certainly we object to it in that capacity, on the grounds it doesn't purport to comply with the terms of the Miller Act.

The Court: Does anybody have any objection for any purpose?

(No response.)

The Court: It may be received.

Mr. Johnson: My objection——

The Court: I understood nobody objected.

Mr. Johnson: I object on the grounds of it being offered for that purpose.

The Court: I asked a moment ago if anybody had any [86] objections for any purpose and there was no answer, so I admitted it.

(Testimony of Harold Ashton.)

Mr. Johnson: I will make no objection at this time.

The Court: Very well.

(Plaintiff Apache's Exhibit No. 1 marked in evidence.)

Q. (By Mr. Carr): Mr. Ashton, do you at this time recall whether or not the original or a copy of that letter was sent to anyone by you?

Mr. Catlin: For the purposes of trying to cut down on time, I think it can be stipulated that a copy or the original, I forget which, was sent by me as representing Ashton-Mardian Company to the Hartford Accident & Indemnity Company.

Mr. Carr: Thank you, sir. We will accept that stipulation.

Mr. Johnson: We will admit we received such a communication.

The Court: The record will show the stipulation.

The Witness: I must say that I didn't know that.

Q. (By Mr. Carr): Has the work on the Ajo job now been completed?

A. I believe everything is completed.

Q. Has there been any final settlement with the Government on the job?      A. There has not.

Mr. Carr: That is all. [87]

#### Cross Examination

Q. (By Mr. Johnson): Mr. Ashton, I assume Mr. Mardian was not an agent or a representative of Apache Powder Company in any sense of the

(Testimony of Harold Ashton.)

word?           A. Not to my knowledge.

Q. He was on your side of the project as an associate of yours on this project?

A. He was.

Q. By this letter of March 19th, he was simply stating to you that somebody connected with Apache had orally notified him over the telephone somebody owed him some money?

A. This is a form of inter-office correspondence, you might say.

Q. I believe you stated in your telephone conversation on January 29th with a representative of Armco people, you said that there was some bond coverage which would protect Armco?

A. What date is this?

Q. January 29th, was that conversation you had with a representative of Armco?

The Court: I believe March 11th.

Mr. Johnson: March 11th, that's right.

Q. (By Mr. Johnson): In your conversation on March 11th you stated there was a bond that would protect Armco, is that correct, I think you testified? [88]           A. I believe that is correct.

Q. What bond did you have reference to when you made that statement?

A. I was referring to the bond we had with the Hartford.

Q. You were aware of the fact that Hartford bond only protects you? There is nothing in its terms that runs to anybody besides Ashton-Mardian, is that correct?



(Testimony of Harold Ashton.)

A. If it protects me it would protect them.

Q. You are aware of the fact that the bond indemnifies you for any loss you sustained?

A. I think so. We just pay money to the bonding company. We never seem to get any from them, never have.

Q. I believe you stated in response to several questions something to the effect that you might have held Pioneer Constructors responsible on this job until the Construction Materials contract was actually signed. As a matter of fact, nothing ever came up between these dates which caused you to take any action which caused you to hold anybody responsible, did it?      A. I believe that's right.

Q. The work was going on, there weren't any hitches and nothing was going wrong, so you didn't have any occasion to know exactly who to hold responsible in case something went wrong and some question came up?

A. I believe you are right. [89]

Q. I assume you have no personal knowledge whatever as to how the people on the job, the representatives of the subcontractor, whichever subcontractor it might have been, how they were dealing with regard to their materialmen or suppliers in regard to their orders or checks or anything of that kind, whether they were dealing as Construction Materials or Pioneer?      A. No knowledge.

Q. It was entirely outside your knowledge. Do you *know* *their* payrolls were being handled?

(Testimony of Harold Ashton.)

A. I don't personally know how the payrolls were being handled.

Q. I believe you said you made your last payment to Pioneer Constructors on November 26th?

A. I believe that is correct.

Q. That paid for everything done on the job up until October 31st?      A. That's right.

Q. Normally you would have made another payment during the month of December for another month's work?      A. We normally would have.

Q. And the reason you didn't was that you didn't have a contract with Construction Materials and Pioneer was off the job, so you didn't know who to pay it to, is that right?

A. No. I wouldn't say that necessarily.

Q. What was your reason for not paying it?

A. The reason was that we had an agreement that all work done after October 31st should be done by Construction Materials Company, providing they were able to furnish us with a contract and a surety bond for the completion of this contract.

Q. For all you knew it was being done by Construction Materials?

A. For all we knew it was being done by them. We had no access to their accounting procedures or payroll or checking accounts or anything.

Q. Anyway you had enough information it be deemed done by Construction Materials but you didn't want to pay the money to Pioneer Constructors, isn't that correct?

A. The terms of the agreement we had, we just

(Testimony of Harold Ashton.)

weren't going to pay any money to anybody until this thing was settled.

Q. Did Pioneer submit any bills to you during that time for any of the work done through November or December on any claims?

A. I don't believe they did.

Q. Do you remember during the early part of February, 1957 having a telephone conversation with Mr. Taylor of Hartford?

A. I recall such a conversation.

Q. Do you recall making the statement during that conversation that Pioneer Constructors' contract had terminated on the 31st and Construction Materials had been on since then [91] and there had been no claims filed under the Miller Act?

Mr. Thompson: I am going to object to that as far as Armeo is concerned as hearsay.

The Court: He may answer the question. It isn't binding on Armeo.

Mr. Thompson: Then I have no objection.

Mr. Johnson: Do you want the question repeated?

The Witness: Yes.

(The last question read by the reporter.)

Mr. Catlin: Before he answers, to review your Honor's ruling, I am wondering which case we are in now. If it is not going in on either Apache or Armeo, it is apparently going into the third facet of the case between Hartford and Ashton-Mardian.

Mr. Johnson: If your Honor please, I will explain that it is strictly cross examination on Apache

(Testimony of Harold Ashton.)

and Armco for this reason: The witness has given considerable evidence as to what the relationship was between these parties on October 31st and the first party of January. I can introduce this statement as a relationship of what this witness considered this relationship to be which has been gone into.

Mr. Thompson: I don't think that conversation with the Hartford man should be binding on Armco.

Mr. Johnson: It is binding on the witness.

The Court: I have permitted him to answer. What date [92] is this conversation?

Mr. Johnson: It was during the first week in February. I don't have the exact date.

The Witness: I don't recall the conversation, but under the circumstances I don't see any reason I wouldn't have made such a statement. I might and might not have. I don't recall the conversation that precisely.

Q. (By Mr. Johnson): It is possible you made such a statement?

A. I think it is possible.

Q. Or substantially such a statement?

A. I could have very easily made such a statement. I don't know what difference it made to the Hartford. They dated the bond on the 1st of November. I don't know why I would want to be concealing such information.

Mr. Johnson: I move the last answer be stricken as not responsive.

The Court: It may stand.



(Testimony of Harold Ashton.)

Mr. Johnson: I believe that is all.

#### Cross Examination

Q. (By Mr. Fickett): Mr. Ashton, you said that it was the latter part of November, 1956 when you conversed with Joe Skorpick and Tom Moore, they were then the president and vice president of [93] Pioneer Constructors. They didn't make any such statement to you during that conversation, did they?

A. No. I don't think anyone asked me if they did.

Q. The only thing that you base that on is that they were the president and vice president of that corporation when the contract was signed and you never received any information to the contrary? That is all you base it on, isn't that right?

A. I think that is all I could base it on.

Mr. Fickett: That is all.

#### Direct Examination

Q. (By Mr. Catlin): There is only one thing I would like to ask Mr. Ashton and I would like purely for clarification, I am not sure there is a misapprehension among attorneys here just how this type of contract works or not. Mr. Ashton, the fact that the contract as drawn with Pioneer, I am referring to Plaintiff Armco's Exhibit No. 6, has the figure \$401,217.83. Does that have any relationship as to the actual amount of money that might be paid under this particular contract except for the fact that—

(Testimony of Harold Ashton.)

A. Had they completed the work, that would have been the amount of money they would have been paid. [94]

Q. With the exact amount?

A. With the exact amount of units.

Q. Of units? A. Yes.

Q. But the units vary on this contract, do they not? A. Yes.

Q. They could have conceivably been paid \$500,000 or \$300,000 under this same contract, depending on the difference in the units?

A. They could have. It is rare it would vary that much, but this is not a specific lump sum amount.

Q. This is not a lump sum contract; neither one are lump sum contracts? A. No.

Mr. Catlin: No further questions at this time. I reserve the right to call Mr. Ashton on direct examination again if necessary.

The Court: You may step down, Mr. Ashton.

(Witness excused.)

Mr. Catlin: May I ask the Court and the other attorneys: Mr. Ashton, it is imperative for him to be in Gila Bend tomorrow. Whether they think they will want Mr. Ashton again tomorrow or not. I am asking your indulgence because it is vitally important Mr. Ashton be in Gila Bend [95] tomorrow. He can return on Thursday if you think it is going that long.

Mr. Carr: As far as we know now, we won't want him for any further questions.

Mr. Thompson: The same is true as far as Armco is concerned, as of the present time I know of no particular reason we should want to examine him further.

Mr. Johnson: Also true as far as we are concerned.

Mr. Fickett: True as far as we are concerned.

The Court: Will you need him, Mr. Catlin?

Mr. Catlin: I don't think so.

The Court: All right.

Mr. Catlin: He can be excused and he will not be in the courtroom tomorrow and if anybody needs him, he can return on request on Thursday.

Mr. Thompson: That is acceptable as far as I am concerned.

Mr. Carr: Acceptable.

The Court: Mr. Ashton is excused then. [96]

\* \* \* \* \*

Mr. Thompson: At this time Plaintiff Armco rests, your Honor.

Mr. Carr: Is J. E. Skorpick in the courtroom?

(No response.)

Mr. Carr: Is Mr. Simmons in the courtroom?

The Court: Do you want to call Mr. Simmons?

Mr. Carr: Yes, your Honor. I will call Mr. Simmons.

MELVIN J. SIMMONS

called as a witness herein, having been first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

Q. (By Mr. Carr): Your name is Melvin J. Simmons? A. Yes, sir.

Q. Where do you reside, Mr. Simmons?

A. 3338 North Chapel, Tucson, Arizona.

Q. You hold a position at this time with Construction Materials Company? A. Yes, sir.

Q. What position is that?

A. Office manager and secretary.

Q. Are you also the treasurer of the company?

A. Yes, sir.

Q. How long have you been office manager, secretary and treasurer of Construction Materials?

A. I don't recall the date, sometime in '55, I believe.

Q. For several years then? [103]

A. Yes, sir.

Q. Prior to March 30, 1956? A. Yes, sir.

Q. Are you now an officer of Pioneer Constructors? A. No, sir.

Q. On March 30, 1956 were you an officer of Pioneer Constructors? A. March 30, 1956?

Q. Yes.

A. I don't believe so, no. Wait a minute. 1956?

Q. '56. A. Yes, I believe I was.

Q. What was your position? Were you officer of the corporation?



(Testimony of Melvin J. Simmons.)

A. Assistant secretary, but the period of time I don't know offhand.

Q. When did they terminate your position as assistant secretary of Pioneer?

A. As far as I know, it terminated when I went off the payroll sometime in, I believe in October or the first part of October, I believe.

Q. 1956? A. Yes, sir.

Q. Did you resign as an officer of the corporation?

A. Yes. Not in writing but by conversation, yes, sir. [104]

Q. On March 30, 1956 were you also assistant treasurer of Pioneer? A. No.

Q. On that date were you an office manager for Pioneer? A. Yes.

Q. On that date did Pioneer and Construction Materials occupy the same offices?

A. They did.

Q. Who were the other officers of Pioneer?

A. Other than J. E. Skorpick and T. E. Moore, I think William Nanini. I believe William Nanini was the other officer.

Q. What was Mr. Skorpick's position?

A. At that time he was president.

Q. And Mr. Moore's?

A. Vice president.

Q. Did they hold positions as officers with Construction Materials? A. They did.

Q. What were those positions?

A. President and vice president.

(Testimony of Melvin J. Simmons.)

Q. Skorpick was president and Mr. Moore was vice president? A. Yes, sir.

Q. Pioneer and Construction Materials occupied the same offices on March 30, '56, did they not?

A. Yes, sir.

Q. And had the same addresses as a result?

A. I believe they used a different box number, but it was the same address.

Q. Did they have the same telephone numbers?

A. Yes, sir.

Q. You had, in fact, a switchboard serving all of the two companies and all employees in those companies there? A. That's right.

Q. Did that situation exist as to the same offices and same telephone until November 1, 1956?

A. Yes. They had the same office and same telephone was used I believe on November 1, or October 31 I should say.

Q. Did it continue after that period?

A. Some of Pioneer's stuff remained in the building, yes, but Pioneer did not do any work after October 31st.

Q. After October 31, 1956, did you receive and open the mail addressed to Pioneer Constructors?

A. I don't recall whether I did or the girl that they sent in from Chicago did. I believe the one they sent in from Chicago opened the Pioneer mail.

Q. It was shown to you?

A. I believe it passed over my desk, yes.

Q. That condition continued until after March 12, 1957, did it not? [106]

(Testimony of Melvin J. Simmons.)

A. I do not know what date, how long it continued.

Q. You just stated that after November 1 or October 31, 1956 the mail addressed to Pioneer was opened by you or the office girl and passed across your desk?

A. I say I may have seen it but I did not open the mail, as far as I know.

Q. But you saw the mail?

A. Yes. I believe I saw it.

Q. And the girl in the office opened it?

A. That's right.

Q. How long did that practice continue?

A. That I do not know just how long it continued. It continued for a short time in which then I believe Mr. Catrin came in along with the girl he had sent in before and which he took care of all the mail that came in for Pioneer.

Q. You never saw it thereafter?

A. No, sir. Only in case it was lying on the desk there that they were occupying.

Q. Mr. Catrin and this girl you spoke of occupied the same office?

A. The same room in the building, put it that way. Not in the same office. There are different rooms in the building.

Q. Different rooms adjoining?

A. Yes, sir.

Q. Mr. Simmons, do you know Paul A. Swagerty? [107]

A. I do.

Q. Was he employed by Pioneer Constructors?

(Testimony of Melvin J. Simmons.)

A. He was.

Q. After Construction Materials took over the contract, he was employed by Construction Materials?

A. He was.

Q. He ordered the material for the Ajo job?

A. Ninety per cent of the time, yes.

Q. Specifically, did he order the material from Apache Powder Company after June 24, 1956?

A. I don't know the date, but I am sure he did most or all of the ordering from Apache Powder Company or anybody else.

Q. Up until October 31, 1956 did you receive so-called factory orders from Apache Powder Company for the orders put in by Mr. Swagerty?

A. I don't believe I follow just exactly what you mean by factory order.

Q. Did Mr. Swagerty give you any written memorandum of the orders he gave to Apache Powder Company?

A. I don't recall. We had a purchase order system that probably was in effect, but I don't recall.

Q. Did those Apache Powder Company factory orders mailed to Pioneer come across your desk as part of your duties as office manager?

A. Yes. They would come across my desk. [108]

Q. Was there a man by the name of West employed on the Ajo job?

A. Yes.

Q. What is his full name?

A. All I knew him by is W. D.

Q. W. D. West?

A. Yes, I think that is correct.



(Testimony of Melvin J. Simmons.)

Q. Was he employed by Pioneer Constructors before the change over on the subcontract?

A. Yes.

Q. At the time of the change over he was continued as an employee of Construction Materials?

A. Yes, sir.

Q. Do you know a man by the name of Thomas J. Dietzman?      A. Yes, I knew Thomas.

Q. What was his position at the Ajo job?

A. It varied from grade foreman to equipment operator.

Q. Was he originally employed by Pioneer Constructors?      A. Yes.

Q. Did he continue to work through at the time of the change over and as an employee of Construction Materials?      A. I don't believe so.

Q. You believe his position terminated at what time, to the best of your recollection?

A. I have no records to show. I know from what I am [109] looking through, my records, he wasn't on Construction Materials payroll that I can see.

Q. Do you know a man by the name of H. Creswell?      A. Yes.

Q. What position did he hold on the Ajo job?

A. He didn't hold any position on the Ajo job.

Q. Who was he employed by?

A. Construction Materials Company.

Q. What was his position with Construction Materials?

A. As manager in charge of the ready-mix department.

(Testimony of Melvin J. Simmons.)

Q. Was he an officer of Pioneer Constructors on August 29th, 1956? A. No.

Q. L. O. Hill? A. I don't recall.

Q. Leo Mather or Trotter?

A. I don't recall that name. They must be laborers.

Q. L. L. Witt?

A. L. L. Witt, I don't know his capacity, I do know he was on the job.

Q. Who was he first employed by?

A. I don't know if he worked for Pioneer or not, but I have seen him on Construction Materials records.

Q. Bill Knight?

A. I remember all right. Bill Knight was working with [110] Mr. West.

Q. He was originally employed by Pioneer Constructors? A. Yes. I think he was.

Q. Then continued on the job after the change over of Construction Materials?

A. I don't know. I didn't notice his name.

Q. D. Taylor Wilkie, do you know him?

A. Yes, sir.

Q. What position did he hold?

A. I guess you would call him parts expeditor.

Q. Was he originally employed by Pioneer Constructors? A. Yes, sir.

Q. And carried over onto Construction Materials payroll?

A. I believe we had him on Construction Materials payroll for awhile.

(Testimony of Melvin J. Simmons.)

Q. Were you a stockholder of Pioneer Construction? A. No, sir.

Q. Are you now a stockholder of Construction Materials? A. No, sir.

Q. Have you ever been a stockholder of either company? A. No, sir.

Q. After October 31, 1956 did you act for and on behalf of Construction Materials in the same capacity that you had prior to that time?

A. Yes [321]

Mr. Carr: I believe that's all.

#### Cross Examination

Q. (By Mr. Thompson): Did I understand you correctly, did you state that you severed your connection with Pioneer Construction on or about the 1st of October, 1956?

A. I don't remember the exact date. It was in October that they took the books and everything, when they sent a girl in from Chicago.

Q. You were cut off Pioneer's payroll at that time, is that right?

A. I don't remember if I was cut off the payroll then or October 31st, I would have to check.

Q. It was during the month of October?

A. Yes, sir.

Mr. Thompson: That is all.

#### Cross Examination

Q. (By Mr. Corbin): Mr. Simmons, you were subpoenaed here today to bring certain records?

(Testimony of Melvin J. Simmons.)

A. Yes, sir.

Q. I believe we asked for all the payroll records and vouchers of Construction Materials Company on the Ajo job for [112] the months of November and December of '56 and January of '57?

A. Yes, sir.

Q. Did you bring those with you?

A. Yes, sir.

Q. Were you ever actually, ever have occasion to actually be on the site of the so-called Ajo job?

A. Yes, I was there.

Q. At what times were you on that site?

A. I don't recall the exact dates. There were several times I was there. I know one time particular was I remember was around April 15th besides two or three other times before then.

Q. April 15th of what year? A. '57.

Q. Were you there on the Ajo job in any time during 1956? A. Twice.

Q. Do you know when, at what times those were?

A. No, I don't. One was September sometime.

Q. By which company were you employed at that time? A. Pioneer Constructors.

Q. What was the other time you were there?

A. I went over twice, I believe it was. I was there once in January I believe and April.

Q. That was when you were an employee of what company? [113]

A. Construction Materials.

Q. Mr. Simmons, you have testified here I be-



(Testimony of Melvin J. Simmons.)

lieve that you were an employee of Pioneer Constructors up to a point in October?      A. Yes.

Q. 1956, is that correct?      A. Yes, sir.

Q. Who fired you?

A. I would say Mr. Nanini just said, "That was it, that was all."

Q. When were you first informed that you were no longer to be an employee of Pioneer Constructors?

A. Well, it was in October that they told me there would be no more payroll after October 31st on anyone.

Q. Who gave you instructions in your capacity as an employee of Construction Materials Company?      A. Mr. Skorpick.

Q. Does that apply both before November 1st and during the period prior to November 1st and subsequent to November 1st also?      A. Yes, sir.

Q. Did you prepare the payroll records and the other records of the Construction Materials Company pursuant to instructions from Mr. Skorpick?

A. Yes, sir. [114]

Q. When and by whom were you informed that Construction Materials was taking over the balance of the work at the Ajo job?

A. I don't know the exact date, but it was prior to November 1st.

Q. Were you present at any discussions between officers of the two corporations regarding the switch over?      A. No, sir.

Q. What were you told regarding the switch

(Testimony of Melvin J. Simmons.)

over at the date you do not remember exactly and by whom?

A. I was told by Mr. Catrin that Pioneer payroll would cease as of October 31st and there would be no more payroll for Pioneer Constructors and I was told by Mr. Skorpick that we were going to carry on and take over this job.

Q. With regard to the individual employees on the Ajo job, were there any instructions given you as to what to do about them? A. No, sir.

Q. Then what did you do about the individual employees on the Ajo job who were employees of Pioneer at that point?

A. Those that Mr. Swagerty sent time tickets okayed by him, I paid them by Construction Materials check.

Q. In other words, there was a lag—what is the payroll period?

A. Every week. The first of the week and the end of the [115] week.

Q. In other words, there was a lag of only one week between the time that during which time you may or may not have known who the employees of Construction Materials were on the Ajo job?

A. That's right. It would have been less than that, because the time tickets sometimes came in in the middle of the week.

Mr. Catlin: May I ask your Honor for a suggestion, or would there be any objection to marking these as one exhibit, or how would be the best from the Court's point of view?

(Testimony of Melvin J. Simmons.)

Mr. Fickett: Can we stipulate as to the substance of them?

Mr. Thompson: What are they dealing with?

The Court: We will take the afternoon recess and perhaps you gentlemen can agree how you want to handle them.

(Afternoon recess.) [116]

(After Recess.)

Mr. Catlin: I think, your Honor, we can get by with just a few questions on my part.

### MELVIN J. SIMMONS

previously called and sworn, resumed the stand and testified further as follows:

#### Cross Examination—(Continued)

Q. (By Mr. Catlin): Mr. Simmons, by whom was Paul Swagerty employed on the Ajo job on the week of November 4th and November 10th?

A. Construction Materials Company.

Q. Did he receive a check for that week's work?

A. He did.

Q. And the amount of the check?

A. The net amount of that check was \$132.70.

Q. On which bank was that check written and by whom was it signed?

A. It was written on the Southern Arizona Bank and Trust Company to the account of Construction Materials Company, Construction Materials Division, Check No. 1108, signed by J. E. Skorpick and T. E. Moore.

(Testimony of Melvin J. Simmons.)

Q. By whom was Mr. Paul Swagerty employed on the week [117] which encompasses the date of December 4, 1956?

A. Construction Materials. December 4th? That is December 4th?

Q. December 4th.

A. Construction Materials.

Q. Was Mr. Swagerty paid for his work during that particular week?

A. Yes, he was.

Q. By whom was he paid?

A. He was paid by Construction Materials Company, check No. 1735 in the amount of \$132.70 net drawn on the Southern Arizona Bank account of Construction Materials Company, Construction Division.

Q. Has Mr. Swagerty been an employee of Construction Materials Company from November 4th, 1956 until an arbitrary date which I will mention as, say, May 1, 1957? A. Yes.

Q. Was he paid for his labor during that period of time? A. Yes.

Q. By whom?

A. Construction Materials Company.

Q. Do you know whether or not—you can answer this yes or no—Mr. Swagerty was an employee of Pioneer Constructors at any time after November 4, 1956?

A. I am trying to think. Repeat that again.

Q. Do you know whether or not Mr. Swagerty



(Testimony of Melvin J. Simmons.)

was an employee of Pioneer Constructors at any time subsequent to November 4th, 1956?

A. Do I know whether he was?

Q. Yes.

A. Yes. I know whether he was or not.

Q. Was he an employee of Pioneer Constructors at any time after that date? A. No, sir.

Q. Do you know whether or not Mr. W. F. Sager was an employee of Construction Materials Company for the week of November 4th-November 10th, 1956?

A. I will have to take a minute to check. Yes, he was.

Q. Was he paid for his labor during that week?

A. Yes, sir.

Q. What was the amount of the check and the number of the check and the bank drawn?

A. The amount of the check was \$160.77 net, check No. 1164, drawn on the Southern Arizona Bank and Trust Company, Construction Materials, Construction Division Account.

Q. Was Mr. Sager an employee of the Construction Materials Company? A. Yes, sir.

Q. On the week which includes the date of December 17, 1956?

A. There must have been one of those that slipped out of [119] here. Yes, sir.

Q. Was he paid for his labor during that week?

A. He was.

Q. By what check and what bank?

A. Check No. 1999, amount \$146.85, drawn on

(Testimony of Melvin J. Simmons.)

the Southern Arizona Bank & Trust Company, Account Construction Materials, Construction Division.

Q. I ask you, Mr. Simmons, and answer this yes or no, whether you know if Mr. Sager at any time after November 4, 1956 was an employee of Pioneer Constructors? A. Yes, I know.

Q. Was he such an employee at any time after November 4, 1956? A. No.

Q. Were Mr. Swagerty and Mr. Sager both employees of Pioneer Constructors prior to November 4, 1956?

A. I know Mr. Swagerty was and I am pretty sure Mr. Sager was.

Q. Do you know whether or not Pioneer Constructors paid any of the payrolls that were incurred either by Construction Materials or Pioneer Constructors on the Ajo job after the 1st day of November, 1956? I beg your pardon, strike that and correct it to the 4th day of November, 1956.

A. Pioneer Constructors did not pay any of the payroll on the Ajo job after November 4, 1956.

Q. Who in the Pioneer Constructors organization, of which I believe you were an assistant secretary, paid the payrolls, signed the payrolls for the month of October, 1956?

A. Well, October, '56, the payrolls were probably signed by J. E. Skorpick and T. E. Moore and might have been some signed by myself during that month.

(Testimony of Melvin J. Simmons.)

Q. Were you on the bank account as a signatory of Pioneer Constructors? A. Yes, sir.

Q. Up to what point?

A. I believe it was up until October 31st.

Q. Were you removed from the signature card from the bank at that time on Pioneer Constructors? A. Yes, sir.

Q. You have testified that you were instructed, I believe, by Mr. Skorpick that Construction Materials Company was to pick up the payrolls on the Ajo job effective on November 4th, is that correct?

A. Yes, sir.

Q. Was any explanation given to you at that time by Mr. Skorpick for this change?

A. The only explanation given to me was that Pioneer Constructors was ceasing operation.

Q. Do you have any way of pinpointing the date of those instructions to you? [121]

A. No. I know for a positive fact they would have been before November 4th, but as to the exact date, I don't know.

Q. As a matter of practice, when are the pay checks themselves prepared—when were they prepared during the week?

A. They are started on Saturday following the—which is the last day of the week.

Q. When are they delivered to the employees?

A. Wednesday of the following week.

Q. Were the pay checks delivered to the employees for the work of the week of November 4th, November 10th, in accordance with that procedure?

(Testimony of Melvin J. Simmons.)

A. Yes, sir.

Q. I believe you stated you were the office manager for Construction Materials and previously thereto the office *manage* for Pioneer, is that correct?

A. Yes, sir.

Q. As far as your records and your operations were concerned as office manager, do I understand that Construction Materials was actually on the ground and on the job at Ajo starting with the week starting November 4th, 1956?

A. Yes, sir.

Mr. Thompson: Is that as to office records of Construction Materials?

Mr. Catlin: As far as his records are concerned. [122]

Mr. Thompson: All right.

The Witness: Yes, sir.

Q. (By Mr. Catlin): As far as your records are concerned, did they continue on that job until the finish of the work?

A. They did.

Q. Do you of your own knowledge know of any employee of Pioneer Constructors who was on the job at Ajo after November 4, 1956?

A. I know of none.

Q. Did you have anything to do with the change over from Pioneer to Construction Materials on the Ajo job so far as the relationship between either of those corporations and the Ashton-Mardian Company was concerned?

A. Not actually, only just from bookkeeping and accounting records.



(Testimony of Melvin J. Simmons.)

Q. While I think of it, is it your duty as office manager of these corporations to file the certified payrolls with the Government? A. Yes.

Q. Was that done? A. Yes, sir.

Q. What was the last payroll which was certified to the Government as being that of Pioneer Constructors? A. October 31st.

Q. As far as you know, all those certified payrolls have [123] been filed in accordance with the requirements of the Government, is that correct?

A. That is right.

Q. Did you, Mr. Simmons, have anything to do with the computation of the amount of work remaining to be done which was the basis of the contract with Construction Materials Company?

A. No, sir.

Q. Do you know by whom that computation was done?

A. It was done by engineers of Ashton-Mardian and from the Ajo job, the way I understood it, and the Corps of Engineers man.

Q. By what representative of Construction Materials Company, if you know?

A. Mr. Swagerty, I imagine.

Mr. Catlin: No further questions at this time.

#### Cross Examination

Q. (By Mr. Johnson): Mr. Simmons, do you recall having any contact, conversations or dealings of any kind, with any representatives of the Apache Powder Company since November 1, 1956?

(Testimony of Melvin J. Simmons.)

A. Yes.

Q. Can you tell us what those dealings or conversations consisted of? [124]

A. It has been quite a little while. Some I have forgotten. Some I remember now. The one that I remember was with Mr. Sturm I believe it is.

Q. Mr. Sturm is with Armco?

A. You mean Apache Powder?

Q. Apache Powder is the question this time. I will ask about Armco later.

A. There were several times I called Apache Powder. I don't remember them all. One time in January I called in regards to the billing that had been made to us.

Q. To refresh your memory, would that have been on or about the 10th of December, 1956, I believe you testified in your deposition?

A. I believe that was about the date, yes. It would have been around the time we would have been paying our bills. That would be around December 10th.

Q. That was a telephone conversation?

A. Yes.

Q. Did you call them or did they call you?

A. I called them.

Q. Was anyone present with you at the time you called? A. No, sir.

Q. Who did you talk to at Apache?

A. I don't remember who I talked to. I talked to a man after—a girl answering, but I don't remember who I talked [125] to.

(Testimony of Melvin J. Simmons.)

Q. Who did you ask for when the girl answered?

A. I asked for the bookkeeping or accounting department.

Q. Please relate the substance of that conversation.

A. I explained to them that the powder being sent to the Ajo job should have been billed to Construction Materials because they were doing the work. I would appreciate if they would bill it to Construction Materials. And as I recall, he told me, "Pay these by invoice and get it straightened out," and that is all I remember of the conversation.

Q. Did you pay it by invoice after that?

A. Yes, sir.

Q. You said you had several conversations with Apache. Could you tell us about some of the others, about the others?

A. I don't recall specifically the others. There probably were times I called them or called Swagerty to order materials. There were probably times I called them to get prices on other jobs but specifically I can't recall the times.

Q. Do you recall any other conversation with them which might have been mentioned whether or not it was Construction Materials or Pioneer who might have been on the job other than this one conversation on December 10th?

A. No, sir, I do not.

Q. Did you at any time to your best recollec-

(Testimony of Melvin J. Simmons.)

tion ever represent to anyone connected with Apache Powder or to anyone [126] else that Construction Materials Company was a division of Pioneer Constructors, or words to that effect?

A. I did not, no.

Mr. Johnson: May these be marked for identification?

(Hartford's Exhibits B, C, D and E marked for identification.)

Q. (By Mr. Johnson): I will now hand you a document marked Hartford Exhibit B for identification, which consists of a statement by Apache Powder Company and several invoices by Apache, together with some auto-truck bills of lading, and I will ask you if that is the statement and invoice to which you had reference when you were telephoning, when you talked to Apache Powder Company representative in this telephone conversation on or about the 10th you told us about?

A. Yes, sir.

(Hartford's Exhibits F, G, H and I marked for identification.)

Q. (By Mr. Johnson): I will now hand you Hartford's Exhibit F for identification and ask you whether or not that is a true copy of the check and voucher attached thereto by which you paid that invoice which is in another exhibit?

A. Yes, it is.

Q. Do you have the original cancelled check in your possession?

A. Yes. [127]



(Testimony of Melvin J. Simmons.)

Mr. Johnson: I offer in evidence Exhibit B and F.

The Court: Weren't those stipulated on the pre-trial, Mr. Johnson?

Mr. Johnson: I believe, your Honor, they were stipulated that all these could be admitted except one which counsel said wasn't a true copy. That is Exhibit G, and counsel has furnished me with Exhibit I which he has stated is a true copy of Exhibit G.

The Court: If I can see the backs of them I can tell you which ones were stipulated on the pre-trial.

Mr. Fickett: Can't you offer them all at one time to save some time, Mr. Johnson? There is no question as far as I am concerned.

Mr. Carr: No objection to Hartford's B and F.

The Court: All of these were stipulated on pre-trial that they might be received.

Mr. Johnson: I believe all but one, your Honor. One little red exhibit, I believe H, was not.

The Court: These are E, F and G. They were marked on the pre-trial E, F and G.

Mr. Johnson: The one marked now for identification as G, Mr. Carr advised me is not a correct copy and he did furnish me with Exhibit I which he said was a correct copy of the voucher attached to the check.

The Court: You are not offering G. [128]

Mr. Johnson: I want to offer I in lieu of G for that reason. I do want to offer the part of G

(Testimony of Melvin J. Simmons.)

which purports to be a copy of the check. The check I understand is a true——

The Court: If you will give me those others also. All exhibits marked through I for identification will be received. Those are Hartford's exhibits.

(Hartford's Exhibits B, C, D, E, F, G, H and I marked in evidence.)

Mr. Johnson: I believe without taking the time to question the witness in detail as to each one, may it be stipulated that the checks and vouchers which have been introduced in evidence are in payment of the invoices which are attached to the statements and so show on the vouchers attached to the checks? I believe they speak for themselves.

Mr. Carr: We won't stipulate.

Q. (By Mr. Johnson): I believe you have testified that the check and voucher attached thereto which were introduced as Exhibit F are in payment of the statement attached to Exhibit B?

A. Yes. That is the one.

Q. Do you have a check in your possession dated February 12th payable to Apache Powder?

A. Yes.

Q. We have here Exhibit G which purports to be a copy of the check of that date and a copy of a voucher attached [129] thereto which counsel for Apache has told me is not a true copy of the voucher. He states that Exhibit I is a correct copy of the voucher. I will ask you if the check attached to G is a true copy of the check, the original cancelled check?

(Testimony of Melvin J. Simmons.)

A. Yes. This is a true copy of the check.

Q. I will refer you now to Exhibit C and D which consist of statements together with vouchers and ask you whether or not the check which you have been referring is in payment of all or part of those?

A. This portion here is in payment of that.

Q. The check on Exhibit G is in payment of the vouchers on Exhibit C, is that right?

A. Yes.

Q. I will now hand you Exhibit E and H which are again copies of checks and vouchers and I ask you whether or not that copy of the check is a true copy of the cancelled check in your possession and whether or not that check pays the invoices?

A. Yes, it is; it pays also these invoices which you didn't mention.

Q. Invoices attached to D. Calling your attention to the vouchers which were attached to the checks, it states that it is in payment of the following invoices which you list the invoice numbers. Those invoice numbers are invoices [130] attached to the Exhibits of the statements?

A. Yes.

Q. I notice on each occasion the check paid that particular group of invoices for those amounts and did not pay any of the old balance which apparently had been charged to some earlier date, is that correct?

A. That's right.

Q. What was the reason for payment in that manner?

(Testimony of Melvin J. Simmons.)

A. As I stated, these particular invoices should have been billed to Construction Materials and that is the reason I paid them by invoice in order to clarify that particular point.

Q. The checks which you paid were signed Construction Materials? A. Yes.

Q. As on the invoices? A. Yes.

Q. Who was the individual who actually signed the originals of the checks?

A. J. E. Skorpick and T. E. Moore and two cases, J. E. Skorpick in the other one.

Q. In each case the check is headed Construction Materials Company, Construction Division, giving the address, signed Construction Materials Company by the individuals named.

Do you recall on or about December 10, 1956 a telephone conversation with Mr. Sturm of Armco Drainage Company? [131]

A. I don't recall the date, but I remember now the conversation with Mr. Sturm.

Q. If Mr. Sturm testified under oath and made affidavit it was made on December 10th, would you accept that date as approximately correct?

A. As far as I know, yes; I don't recall the date because I didn't keep a record of it.

Q. Do you recall the substance of that conversation?

A. Yes. It was shortly after Mr. Swagerty called me about being short, the exact material, I don't know what it was. It was something they were short on the job and asked me to get hold



(Testimony of Melvin J. Simmons.)

of Armco and order it, and in that time I think Mr. Sturm called me on something else. I don't recall what it was at the time.

Q. To refresh your memory, could it have been three rods and lugs for some end sections?

A. I had bolts in my mind.

Q. Go ahead and relate the conversation.

A. As I recall, he said he would have them shipped down and I told him Construction Materials was installing them and he said, "This is part of the original order of Pioneer Constructors so we will just ship them that way. There will be no charge on them."

Q. You are definitely testifying you advised him Construction Materials was on the job on December 10th, is that [132] correct?

A. That was my understanding, yes, sir.

Q. Do you recall whether or not you told him what date the change had taken place?

A. I don't recall that, no, sir.

Q. Did you have any conversation with any other representative of Armco in regard to this matter?

A. Yes. There were times which—you mean in regard to Ajo?

Q. Yes.

A. Another time we ordered some pipe from Armco for the Ajo job.

Q. When was that?

A. The first part of March I think. March 5th approximately.

(Testimony of Melvin J. Simmons.)

Q. March 5th you ordered some material, some construction materials for the Ajo job, is that right?      A. Yes.

Q. Do you recall from whom you ordered that material?

A. They were ordered from the Phoenix office, Mr. Sturm.

Q. Was that order made in the name of Construction Materials or Pioneer Constructors?

A. In the name of Construction Materials.

Q. Do you have any written records in regard to that order of the 5th you have been telling us about? [133]

(No audible answer.)

(Hartford's Exhibit J marked for identification.)

Mr. Johnson: At this time we offer Hartford's Exhibit J for identification which is the "no charge invoice" in December which the witness is referring to. Possibly it is a duplication of one of Armco's offers. I am not sure.

Mr. Thompson: No objection.

The Court: It may be received as Hartford's Exhibit J in evidence.

(Hartford's Exhibit J marked in evidence.)

(Hartford's Exhibit K marked for identification.)

Q. (By Mr. Johnson): I hand you Hartford's K for identification and tell me what that is?

A. That is an invoice for an order placed on 3/5, shipped 3/7, invoice dated 3/8, to Construc-

(Testimony of Melvin J. Simmons.)

tion Materials, shipped to the Ajo job in care of Mr. Swagerty. It is for one——

Mr. Thompson: That hasn't been offered in evidence.

Mr. Johnson: I just wanted to know what it is.

Q. (By Mr. Johnson): This item reading from the invoice—— A. It is a duplicate.

Q. Duplicate copies of the same invoice and the third is an acknowledgment? A. Yes.

Mr. Johnson: I offer in evidence Exhibit K at this time. I state at this time the purpose for the offer, your [134] Honor. It involved material which is not involved in this lawsuit. However, it is offered for impeachment purposes for the reason Mr. Sturm testified positively he did not know until March 11th at the time of this conversation with Mr. Gibson that there had been any change on the job, that Construction Materials was on the job, whereas this invoice shows at least someone connected with Armeo knew on the 5th or the 6th that Construction Materials was out there.

Mr. Fickett: It is an Armeo invoice, isn't it?

Mr. Johnson: Yes.

Mr. Thompson: If the Court please, it is offered for impeachment purposes only. However, I believe Mr. Sturm testified these invoices were sent out of the San Francisco office of Berkeley, not from Tempe, and there is no way of showing whether or not he had knowledge of the invoices at this particular time.

The Court: Mr. Johnson, do you contend there

(Testimony of Melvin J. Simmons.)

is anything in the exhibit that shows Mr. Sturm had notice?

Mr. Johnson: The witness testified the order he thought was placed with Mr. Sturm, these invoices.

The Court: Let us get to that. That is the witness' testimony. What about the exhibit?

Mr. Johnson: I don't think the exhibits have Mr. Sturm's name on them at any point. They are on Armeo's form and show that Armeo had notice, whether Mr. Sturm did or not. [135]

The Court: You have offered them by way of impeachment of Mr. Sturm?

Mr. Johnson: Yes.

The Court: Unless they would serve to impeach him, the objection would be good.

Mr. Johnson: I will offer them then for the further purpose of showing that Armeo Company had notice at an earlier date than the notice Mr. Sturm admits he received.

Mr. Thompson: I fail to see the materiality of that actually, your Honor.

The Court: May I see the exhibit.

Mr. Johnson: I think Mr. Sturm testified his first knowledge was on the 11th of March. This exhibit shows that somewhere in the Armeo organization, at least, a notice came to somebody before that date. I believe it is permissible to show notice that tends to corroborate Mr. Simmons' statement that at an earlier date in December he told Mr. Sturm that Construction Materials was there.

Mr. Thompson: It simply shows that if any-



(Testimony of Melvin J. Simmons.)

thing, there was an order made by Construction Materials Company by Mr. Swagerty.

The Court: I am going to let it in. I don't think it is going to make a bit of difference to me. As I see it, the question between Armco and Ashton and Hartford and the others here is whether the notice was given within ninety [136] days. I don't think as far as that particular facet of the case is concerned a changeover from Construction or from Pioneer to Construction has a great deal to do with it.

Mr. Johnson: Your Honor, it has something to do at this point, that Armco was relying on that December delivery to bring itself within the ninety days.

The Court: That is true, but according to the evidence so far, that December delivery was encompassed within the purchase order that was entered into in April and the Statute is that within ninety days from furnishing the last of material to the supplier or subcontractor.

Mr. Johnson: We contend it was furnished to a different subcontractor and Armco had notice it was.

The Court: It might be. I am only going on the evidence so far that a different sub took it and used it but it couldn't alter the fact as to where it was furnished, if it was actually furnished for Pioneer. This thing is a little bit confusing in that here are two people, Pioneer and Construction that are undertaking to make deals among

(Testimony of Melvin J. Simmons.)

themselves and actually it wasn't until January that the prime on the job said, "Okay, I will recognize Construction as a subcontractor." In the meantime the work goes along. The subcontract is pursued and if Construction used it, I don't see, even if they did use it under those circumstances, I don't see how you can say theirs wasn't furnished under the [137] original contract. But I will receive the exhibit. I don't think it makes enough difference to fuss about.

(Hartford's Exhibit K received in evidence.)

Q. (By Mr. Johnson): I take it you don't recall any conversations with anybody connected with either Apache or Armco subsequent to November 1, 1956 other than those we have gone into here today, is that correct?

A. No conversation, no, that I can remember.

Mr. Johnson: I believe that is all.

Mr. Fickett: No questions.

### Redirect Examination

Q. (By Mr. Carr): I will hand you Hartford's Exhibit E, Mr. Simmons, and ask you whether those are the invoices from Apache Powder Company to the Pioneer Constructors dates in the month of November, 1956? A. Yes.

Q. Hartford's C are Apache invoices and Pioneer for the month of December, '56?

A. That's right.

Q. Hartford's D are Apache Powder invoices to Pioneer issued in the month of January?

(Testimony of Melvin J. Simmons.)

A. That is correct.

Q. And Hartford's E are Apache Powder Company invoices, [138] which invoices were issued on March 12, 1957? A. That's right.

Q. How did these come into your hands, Mr. Simmons?

A. I imagine they were given to me by either Mr. Catrin or his girl.

Q. Don't all these documents here refresh your recollection? Can't you tell us directly and positively how you came into possession of them?

A. No. I know that the stuff that came into Pioneer like this which was in error should have been Construction Materials they turned over to me. I know that for a positive fact, but to say just how these came into my possession other than one of them gave them to me, that is the only way I would know I got them, except the one in November, I may have opened the one in November myself.

Q. They came to you as they were received by Pioneer, not in bunches by the month?

A. No. They came to me as they were received.

Q. How long did Pioneer Constructors keep someone there to receive mail and take care of the Pioneer business?

A. I don't recall the date, but I think it was in the latter part of January or February. It may have been later than that, but I don't recall.

Q. After January or February of 1957, Con-

(Testimony of Melvin J. Simmons.)

struction Materials got the Pioneer mail, is that true? [139]

A. No. I believe it went to Fickett & Dunipace and they forwarded anything on it to us.

Q. Fickett & Dunipace are the attorneys in this case for Pioneer?

A. That is my understanding, yes, sir.

Q. You knew that at the time?

A. Yes, sir.

Q. On December 10, 1956 according to your previous testimony you called up Apache Powder Company in Benson?

A. On or about December 10th, yes.

Q. And you asked for the bookkeeping or the accounting department?

A. I believe that is the way I stated it, yes, sir.

Q. In one of your statements in the deposition, Mr. Simmons, that you gave you stated that you asked for the purchasing department. You were in error at that time?

A. No. As I stated, I don't know whether I called for purchasing. If I said purchasing I am referring to the accounting department, but that is what I meant anyway. I don't know if I said purchasing, but I meant accounting department or bookkeeping department. Someone handling the account.

Q. Did you ask the persons' name?

A. No, sir, I did not.

Q. Did you ask what his capacity was with the company? A. No, sir, I did not. [140]



(Testimony of Melvin J. Simmons.)

Q. Was this a matter of importance to Construction Materials Company to have invoices on the Ajo job directed to them instead of Pioneer?

A. I didn't get that.

(Last question read by the reporter)

A. Yes, I believe it was.

Q. Why didn't you write a letter?

A. I don't know. I just didn't.

Q. Did you ever write a letter to Apache Powder Company?

A. I did not, except in regard to the—later, after all this had transpired in regard to the powder. I believe it was removed from the job.

Q. What was the date of that letter?

A. I don't know if I wrote it. Mr. Yeager wrote that letter August 3rd, I believe.

Q. August 3rd, 1957?

A. I wrote one August 3rd, yes. August 3rd I wrote one but August 1st Mr. Yeager wrote one.

Q. Your first communication with Apache Powder was October 3rd, 1957?      A. In writing?

Q. By letter.      A. Yes.

Q. Why didn't you ascertain the name of the person you were talking to? [141]

A. Mainly because I didn't think about it. I think I was interested in getting it changed and mentioned it to him and thinking it would be taken care of.

Q. Why didn't you ascertain what job he held with the company?

(Testimony of Melvin J. Simmons.)

A. I never made it a point to do that, and I guess maybe it is negligence on my part, but I didn't do it.

Q. After February, 1957 I believe you stated you received the invoices from Fickett & Dunipace?

A. I think it was about that time. I am not sure.

Q. Did you also receive the factory orders, copies of the factory orders?

A. They were probably on the job. I probably didn't see those. You mean the shipped bills of lading?

Q. No, the Apache Powder Company factory orders, copies of which were sent to Pioneer Constructors.

A. I don't recall what they are. I may and I may have received some, but I don't recall; if I did, they are with these things. That is everything I have.

Q. After February, 1957 did you receive the monthly statements from Apache Powder addressed to Pioneer?

A. Not that I know of. If they got in our possession they were forwarded to Fickett & Dunipace. It may have been March, but it was around that time.

Mr. Carr: That is all. [142]

Mr. Thompson: No questions, your Honor.

Mr. Johnson: That is all.

Mr. Carr: May I ask a couple more questions?

(Testimony of Melvin J. Simmons.)

Further Redirect Examination

Q. (By Mr. Carr): Are you an accountant by profession, Mr. Simmons? A. Yes.

Q. How long have you been such an accountant?

A. I imagine you can classify me in that classification since 1945.

Q. Were the invoices from Apache Powder directed to Pioneer after November 1, 1956 returned for correction? A. No, sir.

Q. Why not?

A. Because I was instructed by one of their men to pay them by invoice and that is the way I did it and I figured that was sufficient.

Q. Yet you don't know who this man was or his capacity with Apache? A. No, sir, I don't.

Q. When you received the monthly statements from Apache Powder Company directed to Pioneer Constructors, why didn't you return those for correction or recheck them?

A. I saw no reason to. We were paying the bills that [143] came to Construction Materials, and as far as the balance that was carried forward, I assumed it would be correct. I had no way of checking.

Q. So your only communication in all of these transactions subsequent to November 1, '56 was in regard to the invoices, factory orders and monthly statements, was your letter of October 3rd, 1957 returning one of the monthly statements?

A. Yes. At that time I got tired of the post

(Testimony of Melvin J. Simmons.)

office putting them in my box instead of sending them to Fickett & Dunipace.

(Plaintiff Apache's Exhibit 2 marked for identification.)

Q. (By Mr. Carr): I hand you Plaintiff Apache's Exhibit 2 for identification and ask you if that is your signature on that letter?

A. No, sir, it isn't.

Q. Whose signature is it?

A. I would say from looking at it that was the girl that typed it, June McClure.

Q. Her initials appear on the letter below?

A. Yes.

Q. Did you dictate the letter? A. Yes, sir.

Q. This letter is from Construction Materials Company to Apache Powder Company at Benson dated October 3, 1957, [144] returning monthly statement.

Mr. Johnson: I object at this time to his reading the exhibit until it is offered in evidence.

Mr. Carr: He didn't say he signed it.

Mr. Lester: He said he dictated it.

Q. (By Mr. Carr): It relates to monthly statement from Apache Powder dated September 30, 1957? A. Yes.

Mr. Carr: We offer it in evidence.

(Plaintiff Apache's Exhibit 2 marked in evidence)

Q. (By Mr. Carr): Then, Mr. Simmons, you never saw fit until October 3, 1957 to return any



(Testimony of Melvin J. Simmons.)

documents addressed to Pioneer Constructors from Apache Powder Company?

A. No, sir, because I didn't receive them all. Some went to Fickett & Dunipace and some got into our box by error of the Post Office.

Q. But the ones you received——

A. The ones I received I passed to Fickett & Dunipace, as I stated before.

The Court: Is there any objection to it?

Mr. Catlin: This letter is three months after this lawsuit was filed. We have no objection to it for what it is worth. What it is worth is the question in my mind.

The Court: It may be received.

Mr. Carr: That is all. [145]

Mr. Johnson: No more questions, your Honor. May Mr. Simmons be excused?

The Court: Any objections?

Mr. Thompson: Armeo has none.

Mr. Johnson: On one condition, I will want to reserve the right if necessary under the Rules to adopt his testimony as part of mine in chief.

The Court: I understood it was stipulated that the testimony of all witnesses as far as material would be considered in both cases.

Mr. Johnson: All right.

Mr. Carr: We have no objection to his being excused subject to call if at all necessary.

Mr. Johnson: You will be available in town?

The Witness: I will be in town.

(Witness excused)

ROBERT L. HENDERSON

called as a witness herein, having been first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

Q. (By Mr. Carr): What is your name? [146]

A. R. L. Henderson.

Q. Where do you reside?

A. In Benson, Arizona.

Q. Do you hold any position with Apache Powder Company?

A. Yes, sir.

Q. What is that position?

A. General manager.

Q. What are the duties of general manager?

A. Well, direction of the Apache Powder Company at Benson.

Q. You are the active head of the operations for the company?

A. Yes, sir.

Q. Prior to March, 1956, did you have any business relations, did Apache Powder Company have any relations with Pioneer Constructors?

A. Prior to what date?

Q. March, 1956.

A. March, 1956, yes, I believe we did.

Q. Were you supplying materials to them?

A. Yes.

Q. On what jobs, that you recall?

A. Well, we supplied explosives and blasting supplies to Pioneer Constructors on a highway job on Highway 80 near Bisbee near the Mule Pass in

(Testimony of Robert L. Henderson.)

Bisbee and also supplied materials [147] to Pioneer Constructors at a quarry near Tucson.

Q. Was that arrangement on an open account with them?      A. Yes, sir.

Q. Had you prior to that time obtained Dun & Bradstreet reports on Pioneer Constructors?

A. Yes.

Q. Were they favorable or unfavorable?

A. Favorable.

Q. Did the Apache Powder Company learn of the Government contract at Ajo awarded to the Mardian Construction Company?      A. Yes.

Q. Did you ask any of your field agents to investigate?      A. Yes.

Q. Did they contact Mardian Construction Company?      A. Yes.

Q. What was the result?

A. Well, in connection with this Ajo job, one of our field men, according to our usual practice contacted the contractor Ashton-Mardian and was told——

Mr. Johnson: I object to any conversation being from a third person.

The Court: Objection sustained.

Q. (By Mr. Carr): Did an employee of your company subsequently contact Pioneer Constructors in connection with the furnishing of powder on this Ajo job? [148]      A. Yes.

Q. Did the Apache Powder Company obtain the contract for the supply of explosives and blasting supplies under the Pioneer's subcontract?

(Testimony of Robert L. Henderson.)

A. Yes.

Q. Then thereafter did Apache Powder begin furnishing supplies to the Ajo job for Pioneer?

A. Yes.

Q. When was the first shipment of material, if you recall?

A. June 13, 1956.

Q. After that date did Apache Powder Company continue to supply material for the Ajo job?

A. Yes.

Q. When was the last date on which the material was supplied to the Ajo job?

A. March 12, 1957.

Q. Was this material delivered on the job?

A. Yes.

Q. In what manner?

A. By truck, by contract carrier with whom we have do work for us.

Q. In connection with these shipments on the Ajo job, were orders periodically received from Pioneer Constructors?

A. Yes. [149]

Q. As a matter of bookkeeping and accounting practice, what was the first step taken by Apache Powder Company after receiving of an order?

A. After receipt of an order, the form of record and acknowledgment of the order, which we refer to as the factory order, is made.

Q. Is a copy of that factory order immediately sent to the customer?

A. Yes.

Mr. Carr: I ask that this group of documents be marked as one exhibit.



(Testimony of Robert L. Henderson.)

(Plaintiff Apache's Exhibit 3 marked for identification)

Q. (By Mr. Carr): Mr. Henderson, I hand you Exhibit 3 for identification and ask you what they are?

A. This is a factory order, this top one, and there are a number of those.

Q. Have you previously examined this group of documents? A. Yes, sir.

Q. State whether or not they cover all of the orders for material on the Ajo job from June 13, 1956 to March 12, '57?

A. It would be my—I would say it covers it all. It covers from June 13, 1956 to March 12, 1957.

Mr. Carr: We offer them in evidence.

The Court: We will recess at this time [150] until 9:30 in the morning. That will give you time to examine them.

In the meantime, they are marked for identification.

Recess until 9:30 tomorrow. [151]

(Whereupon a recess was taken until 9:30 A.M., March 5, 1958.)

March 5, 1958—9:30 o'clock A.M.

### ROBERT L. HENDERSON

having been previously duly sworn, resumed the stand and testified further as follows:

#### Further Direct Examination

Mr. Carr: If the Court please, I would like to

(Testimony of Robert L. Henderson.)

ask a couple more preliminary questions of Mr. Henderson in regard to these factory orders.

Q. (By Mr. Carr): What are the pencilled notations attached to each of the factory orders, Mr. Henderson?

A. There is a pencilled notation here which is the instruction received in regard to the order, that is the amount and type of proceeds and some delivery instructions.

Q. That is the information received over the phone from which the order was made?

A. Yes, sir.

Q. There is another document called truck inspection report?

A. Yes, that is this one, one of the truck inspection reports which is made of the truck and equipment to see it is in good condition.

Q. Because you are handling explosives? [152]

A. That is right. We check it. It is very important.

Q. There is another document.

A. This is the bill of lading.

Q. That is just an office copy?

A. That is an office copy of the bill of lading.

Q. Are these factory orders as they now exist with the attachments in the form they are kept in your office?

A. That is right.

Mr. Carr: If the Court please, we again offer these factory orders for the purpose of putting in evidence here the orders for powder and blasting

(Testimony of Robert L. Henderson.)

supplies, for the reason that there are no written orders from the Pioneer Constructors in this case; and for the further reason that we wish to show that in all instances these were addressed to Pioneer Constructors and were never returned for correction or never rejected by the Pioneer Constructors.

There is one other point. There is a column here entitled "Code. Above as shipped and Code," and pencil notations. In this first instance it is June 13, factory order, and pencil notations made 28/56. What is that notation?

A. That notation refers to the date of manufacture.

Q. (By Mr. Carr): Of the powder? That was shipped at that time?      A. Yes. [153]

Mr. Carr: We offer these in evidence.

Mr. Johnson: If the Court please, we object to the offer for the reason they are immaterial to any of the issues in the case. I think it is admitted the material was ordered and was delivered. The fact that Apache might have kept it in their records show it was an order by Pioneer is no proof whatever, especially in view of the fact that in their own amended complaint they state from and including November 1, 1956 to and including March 12, 1957 on open account with Pioneer Constructors at the special instance and request of Construction Materials Company they furnished the material. Now, they try to imply this material was furnished at the instance and request of Pioneer Constructors.

(Testimony of Robert L. Henderson.)

The Court: I think I can shorten this. We have in the issues outlined at the pre-trial the question of whether or not the prime and Hartford are estopped to claim that there was more than one subcontractor or that these goods were furnished to Pioneer; and this would bear on that, if it showed no more than that the goods were furnished by Apache in the belief that they were furnishing to Pioneer.

Mr. Carr: They show the specific dates of order and those become important in the case, your Honor.

The Court: They will be received.

(Plaintiff Apache's Exhibit 3 marked in evidence)

Q. (By Mr. Carr): Mr. Henderson, were [154] copies of these factory orders mailed to Pioneer Constructors at the time they were made out in your office?      A. Yes.

Q. Were any of them returned for correction or rejection?      A. No.

Q. Were the factory orders ever returned unopened or for any other reason?      A. No.

Mr. Carr: Will you mark this group of documents, please.

(Plaintiff Apache's Exhibit 4 marked for identification)

Q. (By Mr. Carr): Mr. Henderson, I hand you Plaintiff Apache's Exhibit 4 for identification and ask you what these are?



(Testimony of Robert L. Henderson.)

A. This top sheet, aside from this adding machine tape, this top sheet is a copy of an invoice to Pioneer Constructors for delivery of material; the next sheet is a copy of the bill of lading, on which receipt of the material is acknowledged and signed for.

Q. Is that the original bill of lading?

A. Well, it is—it appears as if it could be an original. At any rate, it is the one which accompanied the load of explosives as it was delivered and signed by the one who received the shipment. Then of course they are duplicated [155] through there for the different shipments.

Q. In every instance these invoices—you have examined this file?      A. Yes.

Q. In every instance are the invoices addressed to Pioneer Constructors?      A. Yes.

Q. Were copies mailed to Pioneer Constructors?      A. Yes.

Q. And in every instance was the bill of lading addressed to Pioneer Constructors at the Ajo job?

A. Yes, sir.

Q. And did Pioneer receive a copy of this bill of lading, and if so, how?

A. Well, they received the copy of the bill of lading with the shipment.

Q. Yes. At the time they receipted for it?

A. Yes.

Mr. Carr: We offer it in evidence.

Mr. Johnson: If the Court please, we object at

(Testimony of Robert L. Henderson.)

this time to the answers of the witness to the last question and ask it be stricken, on the ground he states that Pioneer received them. It is quite obvious this witness can't know whether they were received by Pioneer or Construction Materials. It is a conclusion of the witness. [156]

Mr. Carr: We will consent to that objection for the moment.

Mr. Catlin: Your Honor, may I ask one question on voir dire?

The Court: Yes.

Q. (By Mr. Catlin): Mr. Henderson, were any of these copies ever mailed to Ashton-Mardian or delivered to Ashton-Mardian to your knowledge?

A. Not to my knowledge.

Mr. Catlin: In view of your Honor's statement as to the reason why you accepted the factory orders, we object to these items insofar as they would be offered to show any basis of estoppel on the part of toward the prime contractor, Mr. Henderson stating that these were not mailed or delivered to the prime.

The Court: Mr. Catlin, estoppel isn't built out of any one factor. In other words, estoppel would begin with a good faith belief and act by Apache; then we would be concerned with whether or not Construction and Pioneer by their acts and conduct gave Apache the right to believe and act as they did. Finally we get to whether or not the prime by its conduct in the matter would be in a

(Testimony of Robert L. Henderson.)

position where it wouldn't be heard to say that Apache was dealing with Pioneer in this matter. In other words, here is one situation—it is only one facet of it—you have a prime that knows that work has [157] been going on since before November 1st, he knows when he is approached in late November that people are supplying materials out there to this job. He knows at that time the only subcontractor is Pioneer and that people dealing out there at that time, he must know, I say is charged with knowledge that people dealing with Pioneer is the sub. Then after the bond matter is straightened out, way into January of the next year they come back and attempt to postdate this job back to the first of November. I say that the prime at that time, from what I see here, should have known or was charged with knowledge that people were dealing on that job with Pioneer. No notice was given to them that Construction was stepping in. As a matter of fact, the record shows no notice to anybody except the prime and Pioneer and Construction, when everybody must have known that people continued to deal up into January with Construction as Pioneer.

Mr. Catlin: In other words, your Honor—this is a little bit off of the issue which I stood up on—you are saying to me that it is incumbent upon the prime to show knowledge on the part of either Armeo or Apache, or show information in their possession which will at least put us on even-

(Testimony of Robert L. Henderson.)

Stephen basis as to who they actually were dealing with, do I understand you correctly?

The Court: In essence, yes. I say that you may, although you never got any copies of these documents, you may [158] be in a position because of your failure, when there was a change, or at least when the change was contemplated, your failure to notify these people you should have known were dealing with Construction as Pioneer, your failure to do that may estop you. If, in fact, Apache was dealing with Construction as Pioneer it may estop you to claim they weren't dealing with Pioneer.

Mr. Catlin: But notice to either of the parties, if we can show notice to them—I am not trying to make an argument of the case here, but trying to get in my own mind, if we can show notice to Apache.

The Court: That is true, there could be no estoppel if they knew they were dealing with a different subcontractor.

Mr. Catlin: I renew my objection, knowing of course it will be overruled.

Mr. Johnson: I renew my objection on a different ground, to-wit, immateriality, does not prove or disprove the issues in the case.

The Court: May I see the exhibit, please?

Mr. Henderson, these are all records of the Apache Powder Company which you keep in the regular course of your business?

The Witness: Yes, sir.



(Testimony of Robert L. Henderson.)

Q. (By the Court): The records are made up and obtained in the course of your business and at or about the [159] time the transaction occurred?

A. Yes, sir.

The Court: They will be received.

(Plaintiff Apache's Exhibit 4 marked in evidence)

Q. (By Mr. Carr): Mr. Henderson, in all cases were these bills of lading prepared for receipt in the name of Pioneer Constructors? A. Yes, sir.

Q. Were they receipted for in the name of Pioneer Constructors by persons purporting to act for Pioneer?

Mr. Fickett: We object to that, if your Honor please, the document is in evidence, speaks for itself.

The Court: I think the record shows how they were signed.

Q. (By Mr. Carr): Mr. Henderson, there is evidence in this case which I believe you heard to the effect that the Construction Materials contract was not signed until January 8th, 1957. When was the last previous delivery shown by these invoices and bills of lading, prior to January 8th, 1957?

A. Just prior to January 8th, 1957?

Q. Yes. A. December 20th, 1956.

(Plaintiff Apache's Exhibit 5 marked for identification)

Q. (By Mr. Carr): Mr. Henderson, I hand you Plaintiff [160] Apache's Exhibit 5 for identification and ask you what they are.

(Testimony of Robert L. Henderson.)

A. These are copies of statements directed to Pioneer Constructors, monthly statements showing the status of the account, of our account with Pioneer Constructors.

Q. And the originals were mailed to Pioneer Constructors?           A. Yes.

Q. As of the date of the individual statements?

A. Yes.

Q. And were any of these statements returned with the exception of the one of September 30, 1957?

A. With the exception of this statement of September 30th, 1957, no other statements were returned.

Mr. Carr: We offer these in evidence, if your Honor please.

Mr. Johnson: No objection, your Honor.

The Court: It may be received.

(Plaintiff Apache's Exhibit 5 marked in evidence)

Q. (By Mr. Carr): Mr. Henderson, do these statements to Pioneer Constructors include amounts relating to any other contract than the Ajo job?

A. Yes, they relate to our entire account with the Pioneer Constructors, which would have included other jobs to which we were supplying materials.

Q. And what were those jobs? [161]

A. A highway job on Route 80 near Bisbee, near the Mule Pass, and Tucson quarry of Pioneer Constructors to which we supplied materials.

(Testimony of Robert L. Henderson.)

Q. Do these statements also reflect payments made by Construction Materials on the Apache Powder account?

Mr. Johnson: If the Court please, we object to that form of the question in that it assumes facts not in evidence. The payments by Construction Materials were on the Apache Powder account. The witness has testified positively the payments by Construction Materials were on the Construction Materials account.

Mr. Carr: We believe the evidence of Mr. Simmons they were on the Apache Powder invoices satisfactorily supplies that information.

The Court: Let me have the question, Mr. Reporter.

(The last question was read)

Mr. Carr: May I make a correction, your Honor. The Apache Powder account with Pioneer.

Mr. Johnson: I was thinking about Pioneer.

The Court: He may answer whether it shows the payments by Construction Materials of statements addressed to Pioneer. Is that what you mean?

Mr. Carr: That would be sufficient, your Honor, for the present.

The Court: Do they show that? [162]

The Witness: Yes.

Q. (By Mr. Carr): Now, Mr. Henderson, in connection with deliveries of explosives and blasting supplies to the Ajo job, as evidenced by the factory orders, invoices, bills of lading and statements, was

(Testimony of Robert L. Henderson.)

it the belief of Apache Powder Company at all times up to March 19th, 1957 that these materials were being supplied to Pioneer Constructors under Pioneer Constructors subcontract of March 30, 1956?      A. Yes.

Mr. Johnson: Let the record show an objection to that question on the ground the witness is competent to testify to his own belief but I doubt he can testify to the belief of other persons or belief of a company.

The Court: I will take the answer to be his understanding for Apache rather than any corporate belief.

Q. (By Mr. Carr): Did Apache Powder Company at any time loan to Pioneer Constructors a certain powder and cap magazine?      A. Yes.

Q. When was that done?

A. That was done—well, it was done for at least two of the jobs for which we furnished powder.

Q. I am referring specifically to the Ajo job.

A. The Ajo job. Well, it was done prior to the start of the Ajo job, which would have been early in 1956.

Q. Yes. And is that the Apache Powder customary practice? [163]

A. Yes, it is the customary practice on these contract jobs.

Q. Had they previously loaned powder magazines to Pioneer on other jobs?      A. Yes.



(Testimony of Robert L. Henderson.)

Q. What is the reason or purpose for supplying these magazines, Mr. Henderson?

A. Well, there might be different reasons. It is of mutual benefit. The magazines are loaned, I believe primarily to the contractor so there will be adequate and proper storage on the job for explosives. In addition to that, if we loan magazines with sufficient storage capacity it means we can deliver in larger quantities and it will be available to the contractor when he needs it.

Q. Just very briefly, of what are the magazines constructed?

A. The magazines are constructed of steel, they are welded steel construction, you might say in the form of a small building. It is portable. And they are adequately supplied with doors and provisions for locks and protection inside with wood where it is needed for proper storage of explosives.

Q. Did Pioneer return these magazines to Apache Powder Company, Pioneer Constructors, on or about November 1 or at any later date?

A. No.

Q. Mr. Henderson, you now know that there was a subcontract [164] to Pioneer Constructors and later a subcontract to Construction Materials?

A. Yes, sir.

Q. When did you first learn this?

A. When did I first learn——

Q. Of the termination of the Pioneer subcontract and the execution of the Construction Materials Contract?

(Testimony of Robert L. Henderson.)

A. In March, 1957, March 19th.

Q. 1957? A. 1957.

Q. And from what source?

A. From our attorneys, Evans, Kitchel & Jenckes in Phoenix—as a matter of fact, from Mr. Carr.

Q. Did you request your attorneys in Phoenix to make investigation in regard to the situation there at Ajo? A. Yes.

Q. Why did you do so?

A. Well, you might say there might have been different reasons. We have field men, we keep them in touch with the job and watching particularly when jobs are nearing completion.

Q. For what purpose?

A. So that we will be adequately protected in case there is any indebtedness on the job and we can take action if we need to.

Q. What action do you refer to? [165]

A. Well, as you understand, these contract jobs, including this one, are bonded, and we rely a great deal, principally I think, on the bonding, payment bond on the job to protect us in case the contractor doesn't pay.

Q. That is the payment bond of the prime contractor?

A. Yes. And it is necessary to take action at the appropriate time and so it is important to know when the job is finished and when we make the last deliveries of materials to the job. So that is one purpose of our fieldman. Of course, in general

(Testimony of Robert L. Henderson.)

he is to watch the progress of the job and personnel and equipment and so on, see how it is coming and do what servicing is required for the contractor. But by that practice we were aware this job was nearing completion, or least they were near the end of taking explosives in the early part of March. In addition to that it came to our attention reports of litigation against Pioneer Constructors in regard to payment or non-payment.

Q. From whom were these reports?

A. Well, we had a report from Dun & Bradstreet; and there were also statements in the press along about that time of this litigation.

Q. Just prior to your request of your attorneys to investigate?

A. Yes. That was early in March; and we went ahead and [166] reported to our attorneys and asked them to investigate and do what was necessary to protect our interests.

Q. As a result of this inquiry to your attorneys were you then informed that the Pioneer subcontract was terminated as of October 31, 1956, and the Construction Materials contract executed as of October 1, 1956?

A. That was the information——

Q. November 1.

A. November 1, 1956. That was the information that was given to me at that time.

Q. Was Apache Powder Company ever notified by Ashton-Mardian, Pioneer, Construction Materials, or anybody else of the termination of the

(Testimony of Robert L. Henderson.)

Pioneer subcontract and the execution of the Construction Materials contract and the fact that Construction Materials was proceeding with the job as an independent subcontractor?      A. No.

Q. Did you obtain this information from any other source prior to March 19, 1957?

A. No.

Q. Now, after Apache Powder Company was notified—at this point, when was the last material supplied by Apache Powder Company on the Ajo job?      A. March 12, 1957.

Q. And thereafter was a claim made to Mardian Construction [167] Company and Ashton Building Company and Ashton-Mardian Company under the payments bonds for the sums due from Pioneer?      A. Yes.

Mr. Carr: Mark this.

(Plaintiff Apache's Exhibit 6 marked for identification.)

Q. (By Mr. Carr): I hand you Plaintiff Apache's Exhibit 6 for identification and ask you what that is.

A. This is a claim made by or for Apache Powder Company to Ashton-Mardian Company, Ashton Building Company, Pioneer Construction Company on indebtedness on the job, Corps of Engineers, U. S. Army Contract for Air Force Station, TM-181, at Ajo, Arizona.

Mr. Carr: We offer it in evidence.

Mr. Johnson: No objection.

Mr. Catlin: No objection.

The Court: It may be received.



(Testimony of Robert L. Henderson.)

(Plaintiff Apache's Exhibit 6 marked in evidence.)

Mr. Carr: Will you mark these?

Mr. Catlin: It is stipulated it was received and sent by registered mail, I believe, in the pre-trial conference.

Mr. Carr: It is offered for the purpose, your Honor, of showing exactly what the claim was. There has been an [168] allegation and admission a claim was made, but this for the purpose of showing just what it was.

The Court: Is it stipulated that the exhibit, the original of Exhibit 6 was received by the prime by registered mail?

Mr. Catlin: Yes.

The Court: On or about April 26th, 1957?

Mr. Catlin: It is so stipulated.

Mr. Carr: I was preparing the registered receipt for introduction.

(Plaintiff Apache's Exhibits 7-A, 7-B and 7-C marked for identification.)

Mr. Carr: We offer the registry receipts in evidence.

Mr. Johnson: No objection.

Mr. Catlin: No objection.

(Plaintiff Apache's Exhibits 7-A, 7-B and 7-C marked in evidence.)

Q. (By Mr. Carr): Mr. Henderson, I hand you Plaintiff Apache's No. 1 in evidence, a letter from Mardian Construction Company to Harold

(Testimony of Robert L. Henderson.)

Ashton, dated October 19, 1957 and——

A. March 19?

Q. March 19, 1957, thank you. And ask you if you note the amount stated in the first paragraph as due from Pioneer to Apache?

A. Yes, I note it. [169]

Q. Yes. Now, this sum is in round numbers \$25,000? A. Yes.

Q. Was that the approximate amount of the account at the date of this letter?

A. Yes, that was the approximate amount.

Q. Now, in our amended complaint we are asking for the sum of \$18,947.96. Between the time of this letter and the filing of the complaint, were there any payments or credits on this account?

A. Yes, there was one or more payments.

Q. Did Construction Materials make a payment after this date? A. Yes.

Q. And was there some credit to the account?

A. Yes.

Q. And that was by way of credit memo?

A. Well, there was an actual payment.

Q. Yes. A. An actual payment.

Q. The account was credited with a payment?

A. And also a credit memorandum later, yes.

Mr. Carr: Mark this.

(Plaintiff Apache's Exhibits No. 8 and 9 marked for identification.)

Q. (By Mr. Carr): I hand you Plaintiff Apache's Exhibit [170] No. 8 and ask you what it is, Mr. Henderson?

(Testimony of Robert L. Henderson.)

A. This is a credit memorandum issued by Apache Powder Company on August 28th, 1957 to Pioneer Constructors in the amount of \$175 for a blasting machine.

Q. And I hand you Plaintiff's Exhibit 9 for identification and ask you what that is?

A. This is a credit memorandum issued by Apache Powder Company August 14, 1957 to Pioneer Constructors for a total of \$1,777.73 for explosives and blasting supplies.

Mr. Carr: We offer them in evidence.

Mr. Johnson: No objection.

Mr. Catlin: No objection.

The Court: They may be received.

(Plaintiff Apache's Exhibits No. 8 and 9 marked in evidence.)

Q. (By Mr. Carr): Referring to Plaintiff Apache's Exhibit 8 in evidence, the credit memorandum of July 30, 1957 to Pioneer Constructors for \$175, what was the occasion of making that or giving that credit to Pioneer?

A. It was a credit for a blasting machine which had been charged to Pioneer Constructors on this Bisbee Highway job and later returned to Apache Powder Company. It was used there and returned and it had been charged to Pioneer, so we gave them credit when they returned it.

Q. Had it been used on the Ajo job? [171]

A. Yes, I believe it was used on the Ajo job later.

Q. When was it returned?

(Testimony of Robert L. Henderson.)

A. It was returned about the end of July or first of August, 1957.

Q. Referring to Plaintiff Apache's Exhibit No. 9, what was the occasion for giving that credit memo to Pioneer Constructors?

A. After we had delivered our last explosives to Pioneer Constructors at the Ajo job, which was March 12, 1957, we of course were anxious to get the magazines released by Pioneer Constructors on that job, so we could take them and supply them to contractors on other jobs. Of course obviously there was some powder used after we delivered it and eventually we got those magazines at the Ajo job, but we found that there were explosives and blasting materials and some accessories in the magazines. So we had an accurate inventory taken of the material in the magazines and issued this credit for that material.

Q. Was this credit memo mailed to Pioneer Constructors?           A. Yes.

Q. Was it returned by Pioneer Constructors?

A. It came back to us.

Mr. Carr: Will you mark this.

(Plaintiff Apache's Exhibit 10 marked for identification.) [172]

Q. (By Mr. Carr): I hand you Plaintiff Apache's Exhibit No. 10 for identification and ask you what it is.

A. This is an envelope addressed to Pioneer Constructors, P. O. Box 2768, Tucson, Arizona. It is postmarked August 22nd, 1957. In addition to



(Testimony of Robert L. Henderson.)

the address it is stamped "Return to writer", also stamped, "Out of Business" and also written, "Out of Business," and has an initial on there.

Q. Is this the envelope in which the credit memo was returned from Pioneer Constructors?

A. Yes.

Mr. Carr: We offer it in evidence.

Mr. Johnson: No objection.

Mr. Catlin: No objection.

The Court: It may be received.

(Plaintiff Apache's Exhibit 10 marked in evidence.)

Q. (By Mr. Carr): Thereafter was the credit memo sent to Construction Materials?

A. Yes. This same credit memo or memos were sent by mail to Construction Materials, addressed to Construction Materials.

Q. Was it returned by Construction Materials?

A. No.

Q. Was there ever any objection from Construction Materials because the credit memo was issued to Pioneer Constructors? A. No. [173]

Q. I believe you have already said Apache Powder Company received some payments from Construction Materials? A. Yes.

(Plaintiff Apache's Exhibits 11-A, 11-B and 11-C marked for identification.)

Q. (By Mr. Carr): Mr. Henderson, I hand you Plaintiff Apache's Exhibit 11-A for identification and ask you what it is.

A. This is a remittance slip which had been

(Testimony of Robert L. Henderson.)

attached to a check received from Construction Materials Company, Construction Division, dated 12/27/56 in the amount of \$4,723.37.

Q. And Plaintiff Apache Exhibit 11-B?

A. This is a remittance slip which had been attached to a check received from Construction Materials Company, dated 2/12/57, in the amount of \$3,417.74.

Q. And Plaintiff Apache's Exhibit 11-C?

A. This is a remittance slip which had been attached to a check received from Construction Materials Company, dated 4/10/57, in the amount of \$4,411.91. In addition to that there are five invoices attached, invoices of Apache Powder Company to Pioneer Constructors.

Mr. Carr: We offer them in evidence.

Mr. Johnson: No objection.

Mr. Catlin: No objection. [174]

The Court: They may be received.

(Plaintiff Apache's Exhibits 11-A, 11-B and 11-C marked in evidence.)

Q. (By Mr. Carr): These remittance slips are the originals, are they? A. Yes.

Q. And did you deposit the checks represented by these remittance slips? A. Yes.

Q. And what was done in connection with those payments?

A. The payments were applied against the balance in the Pioneer account.

Q. Now, I note in connection with Plaintiff

(Testimony of Robert L. Henderson.)

Apache's 11-A and B there are no Apache Powder Company invoices attached?

A. That is right.

Q. Were they sent along with the checks and remittance slip? A. No.

Q. On Plaintiff Apache's Exhibit 11-A there is a reference to a statement: "Billed to Pioneer Const.", abbreviated, "Inv." and three numbers?

A. Yes.

Q. On Plaintiff Apache's Exhibit 11-B there is a statement: "Covers the following invoices," three numbers; [175] "Billed to Pioneer."?

A. Yes.

Q. I note on this "Pioneer" underscored in red and the word "Constructors" was added. Was that done in your office?

A. Yes, that was done by Apache.

Q. And the remittance slip gives the numbers of six invoices and the amounts? A. Yes.

Q. And were these invoice numbers checked to ascertain what they were? A. Yes.

Q. State whether or not they were invoices of Apache Powder Company to Pioneer?

A. They were.

Q. The first check covered what period?

A. Well, the first check covered invoices in, well, in November.

Q. Yes. The second check covered what period?

A. I would say approximately December and January.

Q. And the third check?

(Testimony of Robert L. Henderson.)

A. And the third check through March 12th.

Q. All the remaining invoices?

A. The remaining invoices.

Q. Issued after November 1, 1956? [176]

A. Yes.

Q. Did anything occur on or about December 4, 1956 with respect to the Ajo job and the invoices to Pioneer?

A. Yes.

Q. What happened?

A. Well, on December 4, 1956, or on or about December 4, 1956, there was reported to me receipt of a telephone call on December 4th, 1956 from the Pioneer Constructors job at Ajo, in regard to——

Q. According to the report to you as general manager, who did this statement come from?

A. The report came to me—there was a telephone call from Mr. Swagerty of Pioneer Constructors at Ajo.

Q. To whom?

A. The call came to our shipping clerk at the same time that an order for explosives was telephoned to the shipping clerk.

Q. What was his name?

A. Paul Negley.

Q. What was the substance of that conversation as reported to you as general manager?

A. The substance of the conversation that was reported to me was a request by Mr. Swagerty of Pioneer Constructors that the balance of the invoices for explosives for the Ajo job should be



(Testimony of Robert L. Henderson.)

sent to Construction Materials Company, [177] Construction Division, a division of Pioneer Constructors.

Q. At the time of that report, you said it was given in connection with an order for materials, had any shipments been made to Ajo subsequent to November 1, 1956 and prior to this request by Mr. Swagerty?

A. Yes, it is my recollection that they were.

Q. Kindly refer to Plaintiff Apache's Exhibit No. 4 and if you find any such shipments, state what they were.

A. There is a shipment on November 2nd, 200 cases of explosives; a shipment on November—well, I don't know whether I said November 2nd, 1956—again on November 14, 1956, a shipment of 200 cases of explosives; a shipment on November 28th, 1956 of blasting caps, and a shipment on December 4th, 1956.

Q. That was the order phoned in at the time Mr. Swagerty made this request? A. Yes.

Q. Did this request refer to invoices subsequent to November 1, 1956, or just to invoices subsequent to the telephone conversation?

A. According to my understanding it was subsequent to the telephone conversation.

Q. Now, did you thereafter invoice to Construction Materials? A. No. [178]

Q. Why did you not do so?

A. Well, there are a number of factors that we considered in our action, taking action. Our

(Testimony of Robert L. Henderson.)

arrangement for supplying explosives and for the loaning of magazines had been made with Pioneer Constructors for this job, the subcontractors on the job. We had had no notice that the subcontract with Pioneer Constructors had ever been terminated at that date, we had no such notice. We had not been approached by Construction Materials and we had made no arrangements with them for sale or delivery of explosives or for loan of magazines. We had had no protest about our billing to Pioneer Constructors and we went ahead and did all of our billing and dealing with Pioneer Constructors and we had no protest in going ahead that way.

Q. Now, those invoices you referred to a moment ago of shipments in November, 1956, were they returned for correction?      A. No.

Q. The bills of lading for such shipments, were they receipted in the name of Pioneer Constructors?

Mr. Johnson: Objection, your Honor. The records speak for themselves.

The Court: The records are the best evidence.

Q. (By Mr. Carr): Was there any objection made by Pioneer Constructors or Construction Materials to the continued addressing of shipments to Pioneer Constructors? [179]      A. No.

Q. Mr. Henderson, did you discuss this request of Swagerty's for invoicing to Construction Materials with other people in your organization?

A. Yes.

(Testimony of Robert L. Henderson.)

Q. And the reasons you have just given were the reasons after this considered action, I mean this consideration of the question?

A. Yes. It was after discussion and consideration among our people.

Q. And at that time did you and the heads of the department, the people you discussed this matter with, at that time believe that Apache Powder Company was delivering this material to Pioneer Constructors under the Pioneer Constructors contract of March 30, 1956? A. Yes.

Q. Now, thereafter, when you received these checks from Construction Materials in payment of Apache Powder Company invoices to Pioneer Constructors, was this fact also considered by you and the people in your organization?

A. Yes.

Q. And what was the result of that consideration? A. That is in regard to the——

Q. The receipt of moneys from Construction Materials or Pioneer invoices? [180]

A. Well, we considered it and discussed it and decided it was all right for us to accept these checks from Construction Materials to apply on the Pioneer Constructors account.

Q. For what reason?

A. Well, because the only statement we had had was this telephone call and it said, "Construction Materials Company, a division of Pioneer Constructors"; and the only account we had on

(Testimony of Robert L. Henderson.)

this Ajo job was the Pioneer Constructors account, so we applied it to that account.

Q. During the progress of this work at Ajo, Mr. Henderson, did your field engineers continue periodically to visit the work at Ajo?

A. Yes.

Q. And report back to you? A. Yes.

Q. Did they report any unusual circumstances in connection with the work progressing at Ajo?

A. No.

Q. Any interruption in the work schedule?

A. No.

Q. Any change of management or personnel?

A. No.

Q. Any change in equipment? A. No.

Q. And you as the supplier for Pioneer were continuing [181] to supply the powder and blasting supplies to the job? A. Yes.

Q. Referring to Plaintiff Apache's Exhibit 4, the file of invoices and bills of lading, each of the invoices contain a description of kind and quantity of material and price, does it not? A. Yes.

Q. What was that price that you used?

A. Well, it was a price, a net price which was made up from current list prices of those materials, less discount customarily given to contractors for this sort of work.

Q. And Pioneer had a copy of those list prices?

A. Yes.

Q. And was there any question in regard to the prices on any of this material? A. No.



(Testimony of Robert L. Henderson.)

Q. You are in this business, Mr. Henderson; were those reasonable prices for those supplies listed in these invoices and delivered to the job?

A. Yes.

Mr. Johnson: Your Honor, I object to this line of questioning. There is no issue in the case as to reasonableness of the charges; they haven't been raised or questioned.

Mr. Carr: I don't know that it has been admitted.

The Court: I take it there is no issue. [182]

Mr. Johnson: There is no issue on that.

Mr. Carr: All right.

(Recess.)

(After Recess.)

Q. (By Mr. Carr): Mr. Henderson, shortly after August 15, 1957, were you informed by your attorneys of the taking of the depositions of Mr. Skorpick and Mr. Simmons in Tucson?

A. Yes, sir.

Q. Were you informed that Mr. Melvin J. Simmons in his testimony, the taking of that deposition, reported a call to the bookkeeping or accounting department of Apache Powder Company on or about December 10, 1956? A. Yes.

Q. Did you make an investigation to determine whether or not such a call was made?

A. Yes.

Q. Was such a call made to Apache Powder?

A. No.

Mr. Johnson: I object to that, strictly a hear-

(Testimony of Robert L. Henderson.)

say statement of the hearsay of this witness. He can testify no call was made to him, but he wouldn't know whether any call was made to anybody else. It is certainly hearsay.

Mr. Carr: Your Honor, Mr. Henderson is on the stand here as manager and acting head of the corporation and in [183] charge of all the operations. I believe in that capacity he has a full authority to say that he received certain information, that he made an investigation and as a result of the investigation he found no call was made.

The Court: No, I don't believe that is right, Mr. Carr. These are long distance calls, aren't they?

Mr. Carr: Yes.

Q. (By Mr. Carr): Did you ever hear of such a call?

Mr. Johnson: We object to that as immaterial.

Mr. Carr: I am asking him personally.

A. No.

The Court: He may answer that.

A. No.

Q. (By Mr. Carr): If such a call had been made to Apache Powder Company who would have received it?

Mr. Johnson: If the Court please, we object to that as calling for a conclusion of this witness. Undoubtedly Apache Powder Company has quite a few employees down there; I don't think this witness can say who received a certain call.

The Court: The testimony was that he made

(Testimony of Robert L. Henderson.)

the call and had been put in touch with the accounting department. He may answer that question.

A. If a call came to the accounting department of our company, it would be referred either to the secretary-treasurer, Mr. Schmalzer, or in his absence the assistant secretary-treasurer, Mr. Browning. As calls come through our switchboard they would be directed to the proper place.

Mr. Carr: That is all.

#### Cross Examination

Q. (By Mr. Catlin): Mr. Henderson, what were the credit terms which you extended to Pioneer Constructors on the sale of the powder?

A. Our usual open account terms for this sort of business.

Q. Which are what?

A. Net cash thirty days.

Q. Thirty days net cash? A. Yes.

Q. You have made mention, Mr. Henderson, of the subcontract to Pioneer from Ashton-Mardian. Did you ever see such a document prior to the time—prior to March 19th?

A. Did I ever see—

Q. The subcontract with Pioneer by Ashton-Mardian? A. No.

Q. And then the only reason you knew that they were a subcontractor on the job was that you were told by someone from Pioneer, is that correct?

(Testimony of Robert L. Henderson.)

A. I would hardly say that is correct. I would say that [185] information came to me in my capacity from several sources.

Q. But at that time, I will ask you, did you have any knowledge as to the contents of such a subcontract, if the same existed?

A. Not any detail.

Q. I believe you have stated that this was a pure open account sale to Pioneer Constructors?

A. Yes.

Q. There was no written agreement between you and Pioneer Constructors as to the furnishing of the blasting materials?

A. No written agreement, but they were supplied as a customary copy of our——

Q. Price list?

A. ——price list, and that shows the terms.

Q. There was no difference in this price list and any price list you would supply any other contractor on a job of this nature, was there?

A. No, not for any given material.

Q. Do you know who contacted Apache Powder from Pioneer at the start of the furnishing of the blasting material on the Ajo job?

A. There were contacts made with more than one of the Pioneer people, that is, by Apache representatives.

Q. You don't know of any specific individual?

A. I know of some, yes, I know of some individuals. As I say, I did not make the contract, but they were made by our field people.



(Testimony of Robert L. Henderson.)

Mr. Catlin: Would you mark this for identification?

(Defendant Ashton's Exhibit A marked for identification.)

Q. (By Mr. Catlin): Let me hand you Defendant Ashton's Exhibit A for identification and ask you if you know what that is?

A. Yes, that is a statement of Pioneer Construction accounts receivable, the amount owed Apache Powder Company, posted to November 24, 1936, furnished by Apache Powder Company, C. M. Quinn, who at that time was secretary-treasurer.

Q. I believe this was actually furnished to me at my request?

A. Yes, it was furnished at your request. As it points out, it is a confirmation.

Q. After you had talked to me on the telephone about it? A. Yes.

Q. Is this then an accurate statement up to March 22d of the condition of the account, Apache's account on the Ajo job—I won't say with Pioneer Construction Materials.

A. Yes, to my best knowledge that is an accurate account.

Q. It is correct that this account shows that it laid up to the date of the letter, which is received by the Ashton [187] Company on April 12, 1937, that Apache had not received any payments whatsoever for powder and blasting materials furnished prior to November 1, 1936?

A. That is correct.

(Testimony of Robert L. Henderson.)

Q. And they have not as of this date received any payments for blasting materials furnished prior to that date, other than the credit which was issued, which may be reflected in these prior invoices? What I am saying—I am not trying to trap you.

A. No, but let me explain if I may. That from our standpoint the money that we received from Construction Materials on Construction Materials' checks for Pioneer Constructors' powder invoices, from our standpoint we applied that against the balance, the entire balance of Pioneer Constructors.

Q. I don't want to be argumentative; that is not in accordance with this account then because you will note, Mr. Henderson, that the amount paid and shown as paid by Construction Materials here have been shown as being paying individual invoices, isn't that correct?

A. There are some invoices checked off on those.

Q. As being paid by invoices, as being paid by Construction Materials?

A. There are some checked. Of course, I don't know who checked them.

Mr. Catlin: I don't believe I offered this in evidence, [188] your Honor.

Mr. Carr: May we see it, please?

The Witness: What I mean to say, it acts to reduce the whole balance.

Mr. Carr: No objection.

The Court: It may be received.

(Defendant Ashton's Exhibit A marked in evidence.)

(Testimony of Robert L. Henderson.)

(Defendant Ashton's Exhibit B marked for identification.)

Q. (By Mr. Catlin): Mr. Henderson, I show you Defendant Ashton's Exhibit B for identification and ask you if you know what that is?

A. Yes. This is a letter, dated April 12, 1957, directed to the Ashton-Mardian Company, informing Ashton-Mardian Company of the condition of the account of the subcontractor on the Ajo job.

Q. That was also sent at my request, was it not? I believe it so states in here, outside of the fact I won't get on you for misspelling my name.

A. I am sorry about that.

Mr. Catlin: I offer this in evidence.

Mr. Carr: No objection.

The Court: It may be received.

(Defendant Ashton's Exhibit B marked in evidence.)

Q. (By Mr. Catlin): I will ask you with regard to this [189] letter, Mr. Henderson, and with your permission I will read one paragraph of it to you.

"Beginning with June 24, 1956, Mr. Paul A. Swagerty ordered all of the material. These orders included twenty-two out of the thirty made. On December 4, 1956, we received a telephone message from Mr. Swagerty requesting a shipment of twenty-eight cases of powder and asking that it be charged to Construction Materials Company. Mr. Swagerty indicated that Construction Materials Company is a division of Pioneer Constructors, Inc. This was the first information we had that

(Testimony of Robert L. Henderson.)

there was any connection between the two companies. Mr. Swagerty said nothing about an assignment of the subcontract to Construction Materials Company and the first we learned about any change in the status of the contract was from Mr. Daniel Mardian of Mardian Construction Company about March 19, 1957. As yet, we have had no formal notice of any change in the terms in the status of the subcontract and still do not know the terms and conditions on which the change was made.”

Is that an accurate statement as you recall now of the facts, was there any change you would like to be made in that statement? Do you want to read it for yourself?

A. There is no essential change which occurs to me. This statement: “Mr. Swagerty said nothing about an assignment of the subcontract to the Construction Materials Company [190] and the first we learned about any change in the status of the contract was from Mr. Daniel Mardian of Mardian Construction Company—”. I said it came to me personally through our attorneys, but——

Q. You are speaking——

A. I am speaking, yes, but it doesn't occur to me there is anything substantial.

Q. The information which you wrote me at that time, Mr. Henderson, and on which this is based, came largely from the records of Apache Powder Company, the notes, memorandums and things of that nature, is that correct?

A. Yes.

Q. Were you familiar with all of the circum-



(Testimony of Robert L. Henderson.)

stances, and directing your attention to especially December 4, 1956?

A. Yes, I feel that I was aware of the circumstances.

Q. Is it a practice of the officers and employees of Apache Powder Company to make written memoranda of their telephone calls and dealings with customers?

A. It is a general practice.

Q. I am showing you a portion of Plaintiff Apache's Exhibit No. 3, and especially in connection with—and I believe you call these factory——

A. Factory orders.

Q. Factory orders, which is dated December 4, 1956, and being factory order No. 22046, and showing you a pencil [191] memorandum attached to this factory order and ask you what that is?

A. This is a pencil notation recording an order and it is made by, obviously by our shipping clerk, Paul Negley. The initials are "P. N." That was information about the order.

Q. Is that Mr. Negley's handwriting?

A. Yes, I am satisfied that it is.

Q. And this, you say, is a pencil notation of an order received by Apache?      A. Yes.

Q. And according to that pencil notation who made the order?

A. That is who gave us the order, you mean?

Q. Yes.      A. Swagerty.

Q. And I gather then, the order says: "Con-

(Testimony of Robert L. Henderson.)

struction Materials Company, Construction Division”?

A. Yes. Ordinarily, I think almost invariably the person who takes an order or information over the telephone will attempt to record it just as it is given. And that is what has been done.

Q. Would you read Mr. Negley’s notes here?

A. Yes. “Balance job at Ajo to Materials Construction Division, Phone Swagerty P.M. 12.04. Above is division of [192] Pioneer Constructors.”

Q. Do you have any reason to know whether they were put on at separate times or at the same time?

A. At the same time.

Q. Do you know? A. Yes.

Q. You saw him write it?

A. I didn’t see him write it, but it was reported. He has put his initials on it. It was reported at the same time.

Q. Do your initials appear on here, Mr. Henderson? A. Yes.

Q. And under what statement do they appear?

A. “Please continue billing Pioneer Constructors. R.L.H. 12/4/56.”

Q. I ask you, Mr. Henderson, how long did you consider—I believe you have stated that you had a discussion and considered how you were going to handle the balance of this job over here in view of the request that it be billed to Construction Materials. Who all specifically did you discuss this matter with?

(Testimony of Robert L. Henderson.)

A. With, I am sure with the people in our accounting department.

Q. Did you discuss it with Mr. Neely?

A. Mr. Neely? [193]

Q. I am sorry, the man's name——

A. Mr. Negley.

Q. Negley.

A. Yes, sir. He is in the accounting department and they were largely accounting personnel I believe with whom I discussed.

Q. Did you call or write or in any way make inquiry of Ashton-Mardian Company as to what possible reason there would be for that request?

A. No.

Q. Did you make any request to any of the officers of either Construction Materials Company or Pioneer Constructors as to the reason for the request for the changed billing, future billing?

A. No.

Q. Had you ever heard of Construction Materials Company prior to December 4, 1956?

A. I had some knowledge of Construction Materials Company prior to December 4th.

Q. And what was the nature of your acquaintanceship with them or of them?

A. Well, we had not done business with them. My only recollection of hearing of Construction Materials Company prior to this December 4th was in, one at least, Dun & Bradstreet report, in which Construction Materials Company [194] was named as a related company to Pioneer Constructors.

(Testimony of Robert L. Henderson.)

Q. And you had then seen the Dun & Bradstreet rating on Construction Materials Company?

A. No, not on Construction Materials Company, on Pioneer Constructors.

Q. You just stated that Construction Materials Company was listed as a related company?

A. Yes, but not a report on them. They were named as a related company to Pioneer Constructors in a report on Pioneer Constructors.

Q. You were familiar with that fact on December 4th or prior thereto?

A. In that way.

Q. And that is your reason for the statement in the letter that this is the first information you had there was any connection between the two companies?

A. Well, the only information that we had from the Company.

Q. Is it the policy of Apache Powder Company to rely on a construction job in which you are dealing with a subcontractor, to rely almost exclusively upon the bond of the prime contractor for payment?

A. We place very strong reliance in that, on the bond of the prime contractor for payment.

Q. Is it also the policy of Apache Powder Company when [195] an order is given to it and a request made it be billed to a certain corporation, to not do so, but continue to bill otherwise?

A. If Apache Powder Company were notified in some official manner I am sure that the Apache Powder Company would comply with the request.



(Testimony of Robert L. Henderson.)

Q. You did not feel that the request of the man who had made all of the purchases prior to that time was an official request?

A. I don't believe we would have considered it that way; on such an important thing as a change in a contract or subcontract, that we would get, you might say, a rather casual statement on the telephone from the man that orders the powder to make such a change.

Q. You have already said, Mr. Henderson, you had never seen the subcontract?

A. I wouldn't say I would have had to have seen it to be satisfied that there was a subcontract.

Q. I believe it is stated in your letter and I believe you stated as a fact—I may be wrong here—that almost all of your dealings with this particular job over there were by phone order, is that correct?

A. That is correct.

Q. Is it the policy of Apache Powder Company where its credit terms are cash thirty days, when they are dealing with [196] a subcontractor on a job like this, to go for a period of over six months without any payment before making any inquiry of the prime contractor of the condition of a sub on the job?

A. Will you repeat the question, that is the first part of the question?

(The last question was read.)

A. I would say it is not the policy of the Apache Powder Company to do that, although it is not unusual for that sort of thing to happen in this type

(Testimony of Robert L. Henderson.)

of work, that is, with the contractors. There are certain things that we do. We don't like to go to the prime contractor and embarrass the subcontractor if we can avoid it. We have men in the field who watch the jobs and note whether there is anything unusual going on and report. In this case we had nothing unusual reported. We feel that the intent of a payment bond of a prime contractor is to protect the suppliers and we rely upon that, we have and we do in all cases of contract work.

Q. Do you realize, Mr. Henderson, that in relying on the bond of the prime contractor and by letting things like this go on that you are in effect, if the prime contractor is worth anything in a financial way, putting the burden on the prime contractor? The bonding companies don't have the practice of just paying it out and not getting it back from their principal, you are aware of that situation?

A. Yes. [197]

Q. Mr. Henderson, have there been many occasions in which you have received payment on account with checks and vouchers, indicating specifically what invoices are to be credited with that payment?

A. You say have we received—

Q. Do you receive many payments, checks and vouchers of that nature?

A. Yes, we receive checks of that nature.

Q. What is the usual reason for payment of individual invoices where there are prior amounts owing?

(Testimony of Robert L. Henderson.)

A. Well, I think it would be our experience it is a way of doing business. We have people that specify certain invoices and those that just pay on account. It is just a matter of how they want to do business.

Q. It doesn't raise any question in your mind as being anything out of the ordinary when you receive checks and vouchers of that nature?

A. That is specifying certain invoices?

Q. Yes. A. No, it isn't unusual.

Q. Does it raise any question in the mind of Apache Powder Company and yourself in particular when you have an account that is six months old without any payment and then out of a clear blue sky you start getting checks from another organization, so far as the checks themselves show, in payment of the [198] last invoices?

A. Yes, we note that. That is the reason, as I say, we gave consideration to our course and we reviewed our information from the field in regard to the job and we have got this — our experience with the subcontractor, Pioneer, had been very good before and at that point we could well believe we were going to be paid. And in addition to that we have confidence in the prime contractor.

Q. In other words, you at that point started putting your reliance on Pioneer, is that correct? You have already stated you did not acquaint the prime contractor with the situation, either as to the method in which you were receiving payments, or the fact that you had received a telephone request

(Testimony of Robert L. Henderson.)

to bill to Construction Materials, you have already stated you did not in any way contact the prime contractor regarding the situation at that time. Does that mean you were putting your reliance on Pioneer?

A. No, not altogether. We were putting our reliance in all these places where the account should be taken care of. We weren't concentrating particularly on Pioneer. There is a competitive angle here too, Mr. Catlin. In this business of dealing with the contractors we have many contractors who pay regularly; unhappily we have a few who don't, and it is customary in our industry to go along with these contractors. And if we were to be too rigid and inflexible we would lose [199] a lot of the business because our competitors will be liberal and in many cases more liberal than we.

Q. In other words, Apache is no different than a lot of other contractors or a lot of suppliers, it is the volume in the competitive end and relying, placing your reliance on the prime to back you up in any credit mistakes you might make?

A. No, I wouldn't say that is a correct statement of what I said.

Q. There is one other thing then I am through, Mr. Henderson. I note that there are two order slips, apparently by Mr. Negley, on date of December 4th. Is there any way of telling whether that was one phone call or whether it was two separate calls?

A. I do not know frankly. I don't believe I can



(Testimony of Robert L. Henderson.)

say, except the way it was reported to me was that it was one call.

Q. Both of these were made, I notice the first one was made out to Construction Materials Company and that is where the language is you described before; I notice the other one is made out Construction Materials Company and with ditto marks, Construction Division, and that has been crossed out and "Pioneer Constructors" written in?

A. Yes.

Q. You think that would probably be one call, you are not positive?

A. As far as I can say, it was just one call. [200]

Mr. Catlin: No further cross examination from this defendant.

#### Cross Examination

Q. (By Mr. Johnson): As I understand your testimony, you said, I believe, on December 4th you received information from somebody in your accounting department that Mr. Swagerty by telephone request had requested, in connection with an order, that from then on you make your bills to Construction Materials? A. Yes.

Q. After considering it with other people in your organization you decided, for reasons that seemed sufficient to you, that you weren't going to do it that way, you were going to keep on billing Pioneer? A. Yes.

Q. The thing that mystifies me in that testimony, Mr. Henderson, is this, that when a customer which is apparently as large a volume customer as

(Testimony of Robert L. Henderson.)

these people were, make a request to you, that you decide not to comply with it, you go ahead and not comply with it without telling them your reasons or anything else. Isn't that rather unusual? I can understand your not complying with the customer's request, but don't you generally have a little discussion with him about it when you are not going to comply? [201]

A. I think the way that the request came was rather unusual, and I guess it is repetition, but I believe if the request had come to us in what we considered the proper way that we would have discussed it and complied if it was all in order.

Q. You didn't even feel like you should call Mr. Simmons, Mr. Skorpick or anybody else and find out what this was all about and find out why they wanted that change made and discuss your reasons for not wanting to make it?

A. No, we didn't feel that was indicated at the time.

Q. However, on December 4th you did know through the basis of this telephone call, or had it called to your attention that some entity out there known as Construction Materials, which you thought you had reason to believe was a division of Pioneer, but anyway that somebody called Construction Materials was now on the job, because that request had been made?

A. Yes.

Q. When you received your first payment, which I believe was about December 19th, somewhere along there, was it?

(Testimony of Robert L. Henderson.)

A. Yes, December 19th or 17th. I don't recall the exact date.

Q. When you received that payment you knew of course this same entity, Construction Materials Company, was the one that was signing the check?

A. Yes.

Q. It was their account that was paying you. You also knew from the examination of the voucher or remittance slip attached to that check that the invoices the Construction Materials were paying were the current latest invoices and they were not paying on this old Pioneer account, you knew that?

A. I saw the remittance statement.

Q. As a business man didn't all these things add up that there had been some change of some kind, something was going on and an investigation might be in order?

A. We made an investigation.

Q. What investigation did you make at that time?

A. In the field we—that is in the field and in the continuation of orders coming into us it continued to be exactly the same personnel, reported the same management, the same job, the same equipment; no protest in going on and doing business in the way we had been doing it with Pioneer Constructors, with whom we had arranged to do the business.

Q. Didn't you consider Mr. Swagerty's phone call requesting you do it the other way was in effect a request?

A. The way he put it wasn't as disturbing as if

(Testimony of Robert L. Henderson.)

it had been a direct notification to us that this subcontract with Pioneer Constructors has been terminated and one has been let to Construction Materials. All he said was—that is, [203] it is reported—Construction Materials Company, a division of Pioneer Constructors. So it would be natural to assume from that we were still doing business with Pioneer Constructors. If they choose to call it one division or another, that is within their organization I presume.

Q. Knowing these facts, Construction Materials was there, you were being paid by their checks, that they requested you to bill it to them, and that their checks were only paying their current invoices, why didn't you go to Mr. Ashton, Mr. Skorpick, Mr. Simmons or someone else in a responsible position in these organizations that could have given you the straight facts?

A. We felt that it was the duty of the contractor, subcontractor or prime contractor to give us adequate notification.

Q. In other words, you considered all these factors and came to that conclusion, they should give you notification, that you should sit back and not do anything until they gave you formal notification, is that right?

A. That we should continue with the account as we had it set up until we got some formal notification.

Mr. Johnson: May I see Exhibit 5?

Q. (By Mr. Johnson): You have included in



(Testimony of Robert L. Henderson.)

Exhibit 5, which is your statement over a period of months, are addressed to Pioneer Constructors?

A. Yes.

Q. The way they are set up they show the old balance and list the current invoices for the preceding month?

A. Yes.

Q. Credits or payments that might have been made over the preceding month, is that right?

A. Yes.

Q. All the time December, 1956, January, 1957, February, '57, March, '57, all the way through you kept sending them out the same way?

A. Pioneer Constructors?

Q. Yes. A. Yes.

Q. After March you certainly knew of course that Pioneer wasn't on the job, you had been officially notified by that time?

A. Yes.

Q. Certainly in April and May you knew it?

A. Yes.

Q. I notice here on March 31st, 1957, after you had been notified, you sent out a bill to Pioneer Constructors showing in March invoice to them still the same way, didn't you?

A. Yes. The balance was against Pioneer Constructors of course.

Q. Did you ever make any inquiry of anyone up until you [205] got what you call official notification of this changed situation to find out why Pioneer Constructors were paying you by their check and specifying the current invoices and not paying off

(Testimony of Robert L. Henderson.)

the balance of the account, if as you thought it was all Pioneer Constructors account?

Mr. Carr: I object to the question. It has been asked and answered, I believe, more than once.

The Court: He may answer.

Mr. Johnson: Will you repeat the question?

(The last question was read.)

A. No.

Mr. Johnson: That is all.

#### Cross Examination

Q. (By Mr. Fickett): Mr. Henderson, during all this time you knew Mel Simmons personally, didn't you?

A. No, I did not know Mel Simmons personally and don't yet.

Q. You didn't know he was in charge of the office of Pioneer?

A. I knew that at one stage, but that was after, I think along in March of 1957, as I recall, I got that information.

Q. When you got this information from Mr. Swagerty on [206] the 12th of December, you never took the trouble to call the Pioneer office or Construction Materials office in Tucson and make inquiry there, did you, about the situation?

A. No.

Mr. Fickett: That is all.

(Witness excused.)

## PAUL NEGLEY

called as a witness herein, having been first duly sworn, testified as follows:

## Direct Examination

Q. (By Mr. Carr): Your name is Paul Negley?

A. Yes, sir.

Q. Where do you reside, Mr. Negley?

A. 5719 East Baker Street, Tucson, Arizona.

Q. Are you employed by Apache Powder Company?  
A. Yes.

Q. Were you employed by Apache Powder Company in the period between June 13, 1956 and March 12, 1957?  
A. Yes.

Q. What was your position with the Company?

A. The shipping clerk and billing clerk.

Q. What department of the company is that in?

A. It was in the accounting department.

Q. Who was your immediate superior?

A. Mr. J. L. Schmalzer.

Q. What was his position with the Company?

A. He was at that time, 1956, he was assistant secretary and assistant treasurer.

Q. Did you have anything to do with the orders in connection with the furnishing of materials to the Ajo job?  
A. Yes, sir.

Q. What, briefly, did you do in that connection?

A. I received the orders by telephone and arranged to make the deliveries in accordance with the availability of the materials requested and availability of trucks to make the delivery.

(Testimony of Paul Negley.)

Q. What documents, if any, were prepared under your immediate direction?

A. The factory order was prepared under my immediate direction and the bill of lading for shipment of the material and the invoice.

Q. Were copies of the factory order and invoices regularly sent to customers at the time they were made?

A. Yes. The copy of the factory order was representing acknowledgment of the orders, was mailed to the customer to whom it was sold, and at the time the powder was to be shipped I had caused the bill of lading to be made. [208]

Q. You just stated, Mr. Negley, that you handled the phone orders on this job. Were all the orders by phone rather than on a written order form?

A. All the orders were by telephone.

Q. From whom did you receive these orders?

A. Mr. Swagerty on the job at Ajo.

Q. Do you know his full name?

A. His full name is Paul A. Swagerty.

Q. In connection with the receipt of orders, when did he first start to phone in the Pioneer orders on this job?

A. The first order I received by telephone from Mr. Swagerty was June 22nd, 1956.

Q. Did he thereafter phone in all the orders that were made for the Ajo job?

A. To my knowledge those that I received for the Ajo job were all phoned in or taken by phone from Mr. Swagerty by me, for those.



(Testimony of Paul Negley.)

Q. Did you receive all the orders that he phoned in?

A. No, I wouldn't say I received all of them.

Q. Do you recall how many you received?

A. I received approximately nineteen.

Q. Did those include all of the orders received by Apache Company subsequent to November 1, 1956?

A. Yes, sir.

Q. I call your attention to one of the factory orders [209] Plaintiff Apache's Exhibit 3, that is the factory order of December 4, 1956. Did you prepare this factory order?

A. Yes, sir.

Q. What was the source of the information from which this order was prepared?

A. It was a telephone order from Mr. Swagerty.

Q. At the time of that telephone conversation did you make pencilled notes of the contents of the conversation, the statements made?

A. Yes, sir, I did.

Q. And I refer to the first pencilled sheet attached to this factory order of December 4, 1956, and ask whether or not you made out that pencilled notation?

A. Yes, sir, I did.

Q. With exception of the statement in ink at the bottom, initialled by Mr. Henderson?

A. That is right.

Q. What generally does that pencilled note contain?

A. It generally contains the material that the customer wishes to have delivered.

Q. At the top left hand side appears the words,

(Testimony of Paul Negley.)

“Construction Materials Company, Construction Division, Tucson, Arizona.” Do you recall the purpose of that notation?

A. Yes. Mr. Swagerty informed me upon giving me this order that the balance of the materials for the Ajo job should [210] be billed to Construction Materials Company, Construction Division, Tucson, Arizona, and that this division, this company is a division of Pioneer Constructors.

Q. Down below you have, there is a statement: “Above is division of Pioneer Constructors,” with the address. You made that as a notation from Mr. Swagerty’s statement? A. Yes, sir.

Q. The second pencilled sheet, it started, “Construction Materials. C (Blank) Div,” which is stricken and “Pioneer Constructors” is put in?

A. Yes.

Q. Do you recall making that second notation?

A. Yes, I do.

Q. What was the purpose of the second notation?

A. It was to divide the order, inasmuch as the original request for materials was 160 cases of blasting supplies and my stock, either my stock or the fact that I did not have a big truck to ship that much, made it inevitable I must ship a partial shipment of 28 cases, which is noted here, which is a part of the original.

Q. So that was made subsequent to the telephone conversation with Mr. Swagerty after you had learned the amount of material you had on hand?

(Testimony of Paul Negley.)

A. Yes, sir.

The Court: It is 12:00 o'clock. We will stand at [211] recess until 1:30.

(Whereupon a recess was taken at 12:00 o'clock noon, until 1:30 o'clock p.m.) [212]

March 5, 1958, Afternoon Session

PAUL NEGLEY

previously called and sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Carr): Mr. Negley, you were testifying as to the conversation with Mr. Swagerty on December 4, 1956. Did you report this to your superiors? A. Yes, sir.

Q. To whom? A. To Mr. Schmalzer.

Q. Were you employed and on the job at all times during December, 1956? A. Yes, sir.

Q. Did you receive a telephone call from Mr. Simmons of Construction Materials?

A. No, sir.

Mr. Carr: That is all.

Cross Examination [213]

Q. (By Mr. Catlin): Mr. Negley, just one question. May I have the so-called factory orders. Calling your attention, Mr. Negley, to the notations which I believe you call this an order memo, something like that, you made when you received the telephone call from Mr. Swagerty?

A. Yes, sir.

(Testimony of Paul Negley.)

Mr. Carr: What date?

Mr. Catlin: December 4, 1956.

Q. (By Mr. Catlin): May I ask, during the time that you were talking to Mr. Swagerty on the phone, how much of this notation was made by you at that time while you were talking to Mr. Swagerty on the phone, if you recall?

A. Yes, I recall. I made the notation immediately when one of the balance of the requirements at Ajo to be billed to Construction Materials, Construction Division, and then he gave me the company name, Construction Materials Company, Construction Division, Tucson, Arizona, and I noted what he said as I put it here above is "Division of Pioneer Constructors."

Q. Did you make this notation here at the same time that you made—while you were talking to Mr. Swagerty on the phone?

A. Yes, sir.

Q. Is there any reason why you would date this the same time and then go to another place on there and also date it [214] again? I beg your pardon, it is not dated.

A. I was using the space to allow my notation inasmuch as the body of my notation I have the specification for the material required.

Q. This about the above is a division of Pioneer Constructors, you are positive Mr. Swagerty told you this and this wasn't an assumption on your part?

A. I am positive Mr. Swagerty told me that.

Mr. Catlin: No further questions.

(No further questions indicated.)



## J. L. SCHMALZER

called as a witness herein, having been first duly sworn, testified as follows:

## Direct Examination

Q. (By Mr. Carr): State your name.

A. J. L. Schmalzer.

Q. Where do you live, Mr. Schmalzer?

A. Benson, Arizona.

Q. Do you hold a position with Apache Powder Company?      A. I do.

Q. During the period March 30, 1956 to March 12, 1957, did you hold a position with Apache Powder?      A. I did.

Q. What was your position during that period?

A. Assistant secretary and assistant treasurer.

Q. What were your principal duties as such officer?

A. I was fully in charge of the accounting department.

Q. At that time was Mr. Negley, who just testified, a billing and shipping clerk in that department?      A. He was.

Q. Who was your assistant in the accounting department?      A. Amos Browning.

Q. Have you been in the courtroom during all the trial of this case?      A. I have.

Q. You heard the testimony of Melvin J. Simmons in regard to a telephone conversation, call to Apache Powder Company on or about December 10, 1956?      A. I did.

Q. Did you receive that call?      A. I did not.

(Testimony of J. L. Schmalzer.)

Q. Would you in the ordinary course of the handling of business for Apache Powder receive that call if you had been present and on the job?

Mr. Johnson: I object to that as calling for his conclusion.

Q. (By Mr. Carr): Who would receive a call that came to Apache Powder Company with the request to talk to the bookkeeping or accounting department? [216]

Mr. Johnson: I object.

A. It would have been directed to me.

The Court: The answer may stand.

Q. (By Mr. Carr): If you happened to be absent from your office at the time, who then would it have been directed to? A. Mr. Browning.

Q. Your assistant? A. My assistant.

Q. In charge of the accounting department. Did you receive a call from Mr. Simmons on or about that date? A. I did not.

Mr. Carr: That is all.

Mr. Johnson: No questions.

Mr. Carr: You may step down.

(Witness excused.)

### AMOS J. BROWNING

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Carr): State your name?

A. Amos J. Browning.

(Testimony of Amos J. Browning.)

Q. Where do you reside, Mr. Browning? [217]

A. Benson, Arizona.

Q. Are you an employee of Apache Powder Company? A. I am.

Q. Were you an employee of Apache Powder Company during the period March 30, '56 to March 12, '57? A. Yes, sir.

Q. What was your position with the Company during that period?

A. I was assistant to Mr. Schmalzer in the bookkeeping department.

Q. If a call came to the bookkeeping department or the accounting department of Apache Powder and Mr. Schmalzer didn't happen to be present, to whom would it be directed? A. To me.

Q. Did you receive a telephone call from Melvin J. Simmons of Construction Materials Company on or about December 10, 1956? A. No, sir.

Mr. Carr: That is all.

#### Cross Examination

Q. (By Mr. Catlin): Have you ever had a telephone call from Mr. Simmons? A. No, sir.

Q. You have never talked to him? [218]

A. No, sir.

(No further questions indicated.)

(Witness excused.)

Mr. Carr: That concludes the Apache Powder Company case, if the Court please.

We at this time ask for an amendment of the amended complaint to conform to the evidence.

First, showing in each instance in the amended complaint that the date of the termination of the Pioneer subcontract of the execution of Construction Materials contract was January 8, 1957, and second, that oral notice was given to the prime contractor on March 19, 1957 by Apache Powder Company within ninety days after the last material prior to January 8th, 1957 was furnished by Apache Powder Company on the Ajo job on December 20, 1956.

Mr. Johnson: At this time, your Honor, we object to the portion of the amendment which asks that it be amended saying oral notice was given to the prime contractor on the grounds the Miller Act doesn't provide for oral notice and that amendment would be completely immaterial.

The Court: Leave is given to make the first amendment in regard to allegation regarding the date of the subcontract by Construction and termination of the Pioneer contract. The balance of the motion is denied.

Mr. Lester: May I inquire, your Honor, if that is [219] on the basis of—

The Court: On the grounds it is immaterial.

Mr. Lester: On the basis of some other decision that oral notice can never comply with—in accordance with the Statutes?

The Court: Yes.

Mr. Lester: We would like an opportunity at some time to submit authorities to the Court on that point where it has been held sufficient.

The Court: I know of no case except the case in the Fifth Circuit where the Court on the basis of



one of its earlier decisions indicated that it would be possible to give or to comply with the Miller Act by the giving of oral notice, but that has been disapproved in the Ninth Circuit in the case in which I wrote the opinion. The case that I refer to in the Ninth Circuit is Bowden against Malloy, decided about a year ago.

Mr. Johnson: At this time, your Honor, the third party defendant moves for judgment—or it should be the defendant at least, or the third party defendant—moves for judgment against the plaintiff Armco Drainage Company for the reason that their evidence has failed to support the allegations of their complaint and has failed to prove any cause of action against the original defendant, and hence by subrogation against the third party defendant, and [220] I wish to make the same motion for judgment against the plaintiff Apache Powder Company for the reason the evidence has failed to sustain their allegations, failed to disclose any cause of action against the defendant Ashton-Mardian Company or against the third party defendant, and for the further reason that the evidence as presented by the plaintiff Apache Powder Company affirmatively shows that taken in its most favorable light to them, that a contract between a new subcontract between the prime contractor and Construction Materials was finally executed on January 8th, 1957, that the last delivery of materials prior to the execution of said new subcontract was on or about December, 1957—on or about December 20, 1956, that their notice was not given until April 25, 1957,

which was well beyond the ninety days from either of those dates, and further that their own evidence shows that either they had actual notice in December of 1956 of the change of subcontractors, or if they did not have actual notice, they did have notice of facts sufficient to a reasonable man on inquiry, where reasonable inquiry would have discovered the true state of affairs.

Do you care to hear argument at this time, your Honor?

The Court: No.

Mr. Catlin: For the purpose of the record, the defendant Ashton-Mardian joins in the motion made by Mr. Johnson. [221]

The Court: Very well. I will reserve ruling on both motions.

Mr. Johnson: I will call Mr. Swagerty.

PAUL A. SWAGERTY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Johnson): Please state your name.

A. Paul A. Swagerty.

Q. Where do you live?

A. 3168 North Romero Road, Tucson.

Q. What is your occupation?

A. Construction superintendent.

Q. By whom are you employed at the present time?

A. Construction Materials, Construction Division.

(Testimony of Paul A. Swagerty.)

Q. By whom were you employed during the year 1956?

A. I was hired by Tommy Moore of the old Pioneer organization and later was rehired by Joe Skorpick for Construction Materials, Construction Division.

Q. In what capacity did you work for Pioneer Constructors during the portion of the year 1956 when you were employed by that company? [222]

A. In what capacity?

Q. Yes.

A. As construction superintendent.

Q. Where?

A. At the Ajo Radar Base.

Q. That is the Ajo job we have been discussing in this case? A. Yes.

Q. You have been in the courtroom during the trial of this case and heard the preceding evidence?

A. Most of it.

Q. Do you recall the approximate date on which your employment by Pioneer terminated and you became associated with Construction Materials?

A. Well, it was sometime in October of '56 that Mr. Skorpick and some representative of Pioneer whom I don't know except for one man I had occasion to meet before, Curtis Catrin, called at the Ajo job for the purpose of determining what portion of the work had been done at that time.

Q. Did they advise you at that time from then on you were to be employed by Construction Materials?

(Testimony of Paul A. Swagerty.)

A. Mr. Skorpick advised me I think the following week, but he told me at that time there would be a change. That is why these people were there.

Q. And the following week it was that the change had been [223] made, is that right?

A. My pay check came out Construction Materials, Construction Division. He actually told me at the time there would be a change and asked me to stay on if I would.

Q. Did you hear the testimony of Mr. Negley who testified a little while ago? A. I did.

Q. Did you hear his testimony in regard to a telephone conversation with you on or about the 4th day of December, 1956? A. I did.

Q. Did you have a conversation with him on that day?

A. Well, I don't know. It has been too long ago to pinpoint a date, but I had numerous conversations with Mr. Negley and if the record shows there was an order placed at that date by me, I would say that was correct.

Q. Do you recall a conversation on or about that time in which the matter of billing was discussed, whether or not it should be billed to Pioneer or Construction Materials? A. I do.

Q. Could that have been on or about the time Mr. Negley mentioned? A. I think so.

Q. Tell the Court the substance of that conversation.

A. Well, to regress, Mr. Simmons had called me sometime [224] prior to this conversation and



(Testimony of Paul A. Swagerty.)

asked me that it wasn't just with regard to Apache Powder, it was with regard to any suppliers that we might have dealings with, which were few, and that I remind everyone that the bills should be submitted to Construction Materials, Construction Division, so I took this opportunity to tell Mr. Negley.

Q. Will you tell us as near as you can just what you said and what he said on that occasion? This is a long time and you can't recall the exact words, but if you can give us the substance.

A. At first I told him that future billings with regard to the Ajo work should be billed to Construction Materials, Construction Division. I don't know, I think at the time he asked me with regard to addresses, I told him that he could forward the statements to the same place that he had the previous ones; that Mr. Simmons would take care of them.

Q. Do you recall anything being said about them as to the status of Construction Materials Company, whether it was or was not a division of Pioneer Constructors Company?

A. No, I don't, because I didn't know. I am a construction superintendent. I don't know what affiliates the firm has or don't have.

Q. To the best of your knowledge did you ever make a statement to Mr. Negley or anyone else that Construction Materials Company was a division of Pioneer Constructors? [225]

A. I have not.

Mr. Johnson: That is all.

(Testimony of Paul A. Swagerty.)

Cross Examination

Q. (By Mr. Lester): You have just told us that you didn't know what the exact relationship was between the two companies at that time?

A. No. I had no way of knowing.

Q. It is entirely possible, isn't it, that you may have said something about the relationship, which you thought may have been the relationship between the two companies at that time?

A. As I remember it, since the mail and everything was handled through the same office, I think I made mention to him that the bills should be submitted to the same channels. What he made out of that, I don't know, but as far as what I—the contact I had with Tucson 130 miles away, our payrolls et cetera went through the same channels.

Q. But the point is you did not then know what the situation was between the two companies, isn't that true?

A. I know that I drew my check or was drawing my check from Construction Materials, Construction Division.

Q. Isn't it true at that time you did not know exactly the relationship between those two companies? [226]

A. No, I don't—I don't think I know anything of the Company policy even to this date.

Q. That would be more true then than today, isn't that correct?

A. The only thing I know about the people are the ones that hire me and the ones I work for.

(Testimony of Paul A. Swagerty.)

Q. Isn't that true that you knew less about the relationship between those two companies than you do now?

A. I don't know anything of the relationship now.

Q. It is entirely possible you may have said something that caused Mr. Negley to jot down the notation he did about your conversation?

A. I am not denying. He could have.

Mr. Lester: That is all.

#### Cross Examination

Q. (By Mr. Thompson): Mr. Swagerty, I believe you heard the testimony of Melvin J. Simmons that he received a call from you advising him that in relation to the Armco shipment of metal pipe to the Ajo job, that one of the shipments made probably in the month of October, 1956, did not contain all of the materials ordered, is that correct? A. That is correct.

Q. You asked Mr. Simmons then to see if he could order [227] the balance of those materials?

A. We were in dire need of them and I told him to get them there.

Q. At the time you had this conversation with Mr. Simmons, you knew, did you not, that those materials which you were requesting Mr. Simmons to order were a part of the materials which had been, which were a part of the order signed by the Pioneer Constructors in April, 1956?

A. I wouldn't know about that, but I do know

(Testimony of Paul A. Swagerty.)

they were short on one of your last loads, on your truck deliveries and I knew your truck driver made a memorandum or waybill on it and we didn't receive it, so I asked Mel to check on it. We knew we were short and the material was on order.

Q. You knew it was a Pioneer order?

A. Yes. At that time it would have been.

Mr. Thompson: That is all.

### Cross Examination

Q. (By Mr. Catlin): Mr. Swagerty, you mentioned that Mr. Simmons had instructed you as regards to all your suppliers, to ask them to bill Construction Materials for future orders, is that correct?

A. Not Construction Materials; Construction Materials, Construction Division. [228]

Q. Did you do that? A. I did.

Q. With all of your orders from there on out?

A. Well, no. As Mr. Negley testified, we handled a lot of telephone conversations, we never did meet but we knew one another pretty well and I simply stated from here on out because he knew if he got a call from Ajo and from me it was for that project. We never went through the formality of stating firm names, project numbers.

Q. They said, "Mr. Swagerty, send out 28 cases of powder"?

A. That's exactly right, or whatever my necessity was. It usually called for more than that because the boy had scheduled it.



(Testimony of Paul A. Swagerty.)

Q. How about your other materials which you would order, or were there any other type of materials you would order?

A. There was no other I ordered other than local, automotive parts, and a service station account, things like that. The rest of the materials were all handled through the Tucson office. We did not have an accounting office set up at Ajo.

Q. As far as you were concerned, from some where around the first week in November, you were an employee of Construction Materials, Construction Division, is that correct? A. I was.

Q. And you were not an employee of Pioneer?

A. That is correct.

Q. Did that situation apply to all of the other employees at Ajo who had been?

A. All under my jurisdiction.

Q. Did you ever receive any inquiry from a representative of Apache Powder on the job in Ajo as to who was on the job, Pioneer or Construction Materials, or any inquiry regarding it?

A. Not to my knowledge. Their representatives called on us from time to time, but I don't remember specifically of anybody being there or could have been there.

Q. Did anybody inquire of you?

A. Nobody inquired of me that I can remember or recall at this time.

Mr. Catlin: No further questions.

#### Recross Examination

Q. (By Mr. Lester): I am curious to know the

(Testimony of Paul A. Swagerty.)

distinction you have just given between Construction Materials Co. and Construction Materials Co., Construction Division. Apparently there is some distinction. I noticed it in your testimony. Can you explain it?

A. Well, as I understood it from Mr. Skorpick, the Construction Division was not organized until they took over the balance of the Ajo job. Prior to that time it had been [230] a supplier of aggregate and transit mix supplies. To my knowledge it never built a project in the field, so they established Construction Materials, Construction Division.

Q. How many other divisions are there?

A. None that I know of. That is the one.

Q. How many have there been in the past?

A. I don't know about that. I worked for Pioneer Constructors and I worked for Construction Materials, Construction Division. There is Construction Materials with which I have nothing to do with that supplies transit mix and aggregate to various jobs.

Q. As far as you know there is a distinction between Pioneer, Construction Materials and Construction Materials, Construction Division?

A. That is the way I take it.

Q. But you are not quite sure? A. What?

Q. You are not quite sure what the distinction is?

A. I am sure of the firm I am working for, Construction Materials, Construction Division.

(Testimony of Paul A. Swagerty.)

Q. Do you contend, Mr. Swagerty, that when you made this telephone call in December, 1956, that you at that time notified Mr. Negley that there was a change in the subcontract on this job?

A. I wouldn't put it that way, no. [231]

Q. As a matter of fact, there was no change at that time, was there?

Mr. Johnson: I object to that question as conclusion of this witness. The witness testified he doesn't know the difference between those companies.

Mr. Lester: This question goes to as far as he knows.

A. As far as I know, as I have testified, I was working for Construction Materials, Construction Division. What the policy was, the contract written, the subcontract written, I know nothing about. I know the people that paid me.

Q. (By Mr. Lester): You didn't know what the status of the subcontract was on that job at that time?      A. I had no occasion to know.

Q. Did you ever know at a later date?

A. What the subcontract was?

Q. What the status was at all times if and when it changed?

A. I know this much, that a contract must have changed hands or the people wouldn't have committed themselves to finish the job.

Q. But you don't know when it changed hands?

A. I had no occasion to know. Probably the time they changed my check.

(Testimony of Paul A. Swagerty.)

Q. You couldn't have told Mr. Negley that?

A. Couldn't have told him what? [232]

Q. About the change, because you did not know when it was or that there was going to be one?

A. I was just following out instructions from the Tucson office with regard to billing.

Q. The most you told Mr. Negley then, the most you claim you told him was to make a change in the form of billing?

A. I told him henceforth shipments to Ajo should be billed Construction Materials, Construction Division.

Q. With regard to Apache's Exhibit No. 4, Mr. Swagerty, will you take a look at an invoice which is dated January 17, 1957 and take a look at the bottom where it says Pioneer Constructors. Can you tell me if that is your signature?

A. That is.

Q. In other words, you receipted for the shipment of materials described in that invoice?

A. I did.

Q. You received the materials on the job and signed that invoice?      A. That's right.

Q. Underneath Pioneer Constructors, true?

A. True. All I looked at is 28 cases delivered.

Q. This isn't the only one you signed?

A. No.

Q. You signed a great many of these over the entire project, had you not? [233]

A. I don't know how many. It usually piles up on a mountain some place out of reach. If I



(Testimony of Paul A. Swagerty.)

was two or three miles up on the mountain and it would take an hour for me to get down and Apache's truck come in, the boys, Mr. West, would, or he would assign one of his assistants to help unload the truck. That was a common courtesy, and they receipted for the material when they got it.

Q. You are familiar with the form?

A. Anybody is familiar with the form of bill of lading, but I was interested if I got 25 cases of powder and explosives. That is what I was most concerned with.

Mr. Lester: That is all.

(No further questions indicated.)

The Court: Do you want to excuse this witness?

(No objections indicated.)

(Witness excused.)

Mr. Johnson: We rest, your Honor.

The Court: Is there anything further?

Mr. Thompson: If the Court please, in Plaintiff Armco's complaint on page 3 thereof, I don't know whether this is too important in view of the stipulations that have been made, but in view of the notice indicating the unpaid balance which Mr. Sturm sent to the Ashton-Mardian Company, in paragraph 8, line 4, inadvertently it says during the month of October, and I move the Court to amend that to [234] August at this time. It says October to December. It should be August to December.

The Court: The complaint may be so amended.

Mr. Johnson: Your Honor, at this time we renew our motion for judgment in both cases on the grounds previously stated.

Mr. Lester: We move for judgment on our complaint, if the Court please.

Mr. Thompson: Defendant Armco moves for judgment on its complaint.

The Court: The motion of Armco will be granted.

To me it is clear in their case they did furnish the materials to Pioneer as a subcontractor on the Ajo job; that the last of the materials was furnished on December 17, 1956, and that a notice to the prime contractor complying with the terms of the Miller Act, written notice was given to the prime on the 12th day of March, 1957, within the ninety days.

The motion of Armco for judgment against Pioneer and the prime and the Travelers Indemnity will be granted.

In the other matter, the other case, the thing that gives me question is whether or not Apache had notice or was charged with notice by the early part of January, that the materials furnished after December 4 were actually furnished to Constructors so that they were furnished to a different—a person other than the subcontractor Pioneer, therefore, [235] whether or not their April 25th notice was within the ninety days.

I want to look at some of the exhibits on that to satisfy myself, and on that will determine the decision as to whether or not Apache is entitled to

recover. According to my present views, if they were not on notice or charged with notice by that early date in January at a time before the 15th of January, then I think they would be entitled to judgment, but if they were on notice or charged with notice, then notice under the Miller Act wasn't given at the proper time as to the written notice in April.

Mr. Catlin: Does your Honor wish any argument on this?

The Court: I have a feeling right now, but I want to take a more careful look at the exhibits. That is the situation. I don't think argument will change it any. I have a conviction about it. I just want to study the exhibits again. I looked at them in passing and I want to take a better look at them.

Mr. Catlin: I would like to make one observation.

The Court: I am always open to that.

Mr. Catlin: The observation I would like to make is that, first, that for either of these plaintiffs to recover, we will take Apache, is under the Miller Act, and the Miller Act alone is what gives them the right to recover as far as [236] the Miller Act is concerned.

The Court: And the surety.

Mr. Catlin: And the surety. Therefore, we have to look to the Miller Act in this case solely. I believe I am correct.

The Court: That is right.

Mr. Catlin: The only notice under the circum-

stances, there is no assertion that this supplier had any direct dealings with the prime at all. So they fall down under the second portion which requires that the notice and the only provision in there as to notice is a notice not running from the prime to the supplier, but a notice running from the supplier to the prime. And certain things your Honor said this morning, I don't want your Honor to get his eye off the ball at all as to what notice is called for under the Miller Act.

The Court: The notices I see in the case of Armeo are in your letter of March 11 and the notice I see here from Apache is the letter of April 25th, a registered letter. Are those the ones you think I should keep my eye on?

Mr. Catlin: The thing I was worried about and am worried about is a conception in your Honor's mind of putting a duty onto the prime to notify all of the suppliers of all of the subs at any time when the job is either stopping or where he has by reason, one reason or another, fired a [237] subcontractor or for any other reason that a subcontractor goes off the job. That is the thing that—

The Court: I think there may be an estoppel on the part of the prime and therefore against the surety under certain circumstances. I don't believe a case like this ever happened before. I hope it never will happen again.

Mr. Catlin: It never will with anybody sitting in this room.

The Court: But I have no authority for feeling that there could be an estoppel, but if I find the



facts will warrant it, I wouldn't hesitate to base a judgment on the estoppel theory.

Mr. Catlin: One other observation that was on the law, and that is this, that in taking the testimony of Mr. Ashton, Mr. Simmons and Mr. Swagerty, it would appear that this is what happened: That as far as Construction Materials and Pioneer are concerned, and their various ramifications which we the prime do not know anything about, or did not know anything about, they among themselves made a change on the job not apparent to the prime at that point and not apparent to the supplier, which until the last of November, at which time they at that point apparently had made the—got up nerve enough or something else, to approach the prime to see if he would agree to the change, and which under certain circumstances and certainly under the circumstances that Mr. [238] Ashton pointed out: Can't see how it will hurt us, so you have our permission to go ahead, all of which was formalized, I believe the word Mr. Ashton used, formalized by the actual execution of the contract and the issuance of the Hartford bond at a later date, however, as between the Pioneer and Construction Materials. That change had taken place as far as their dealings are concerned, and if it had been done correctly by them, by those people, it would have been that change as among the suppliers would have been done at that time also because that is when they actually on the ground made the change. Whether the prime under your Honor's theory is charged with that, that of course is your Honor's decision. I wanted

to point out what I thought actually happened.

Mr. Johnson: One brief observation, your Honor. Your Honor stated that the crux of the matter is whether Apache had notice or was charged with notice. I won't discuss the exhibits because your Honor will refer to them, but I do want to point out and emphasize one point in Mr. Henderson's testimony I think should be given very great consideration in that respect, and that is when he stated on cross examination that, yes, he was concerned with all these facts as disclosed by those exhibits but they considered it very carefully and did make an investigation. The evidence shows they made a very inadequate investigation. They didn't talk to Skorpick, Ashton, anybody else that would know. Thereby [239] by his own admission he was on notice that there might be something going on and decided to make an investigation of it. I believe that is a fact that should be considered along with exhibits, that by Mr. Henderson's own admission, own statement, the way he considers this matter.

Mr. Lester: One brief observation. It seems to me defendants' defense in this case boils down to this: They say Mr. Apache on December 4th, we gave you enough of a hint as to what the underlying truth of the situation was, and had you employed your imagination and had you conducted a thorough investigation, you would have discovered the truth. Bear in mind, your Honor, that on December 4th there was no change in the subcontract, so what would we have found out had we exercised

our imagination and our diligence in conducting this investigation which I submit in the first place we were under no duty to do. We would have found out there was no change in the subcontracts. The most we could have found out at that time had the principals involved chosen to tell us the truth, was that one was contemplated and might eventually, depending upon certain contingencies, be executed. So, what would the result have been had we elected to act upon this December 4th hint? Had we elected to do business with the new subcontractor who was not yet the subcontractor, and then on January 8th for some reason the contract not changed because by the company or one thing and another did [240] not materialize as they expected, and had the situation remained the same, that is, had Pioneer remained the sub for one reason or another, then they could come in and say you jumped the wrong way. You elected to go with Construction Materials Company. You made a bad guess. We thought we were going to change subcontractors but we did not. You are therefore out under the Miller Act because ninety days expired. They say you didn't dream the truth and had you exercised your imagination you would have found out what was going on and would have been able to jump one way or the other and had you jumped the right way you would be okay, but we did not know which way to jump because that never developed until January 8th. It seems perfectly ridiculous to me to suggest that Apache who had no part in these negotiations with the sub and the prime was under an obligation

to play detective in the matter and find out what their imaginations were, when they themselves knew and could just as easily have told us instead of merely hinted to us in this manner by having an employee in the office call and say please change your billing. They knew we weren't changing it. We never did change it. They knew it all along, that it was never returned to us. They could have just as easily written a letter. That would have been the natural thing for any business man to do in the situation, was to write a letter and say we are going to change the situation and when changed to write and [241] tell us we have changed it. To me it is reminiscent of the old shell game, which one has the bean at which time.

Mr. Catlin: Your Honor, he speaks of "they". We don't want to be associated with Pioneer as far as the "they" is concerned. They owe the bill and should have paid it and we would like to see all suppliers get paid, but the "they", we don't want to be accused of.

Mr. Lester: I am not accusing the prime. The only thing about the prime is that they did have official oral notice as reflected by the written memorandum from Mr. Mardian to Mr. Ashton within the ninety days, and depending how your Honor rules, if your Honor continues to rule adversely to us on that point, then, of course, we have nothing to do but rely on our written formal notice of April 25th.

The Court: The plaintiff Armco will prepare findings of fact and conclusions of law and a judg-



ment. I will decide 967 in the next few days.

Mr. Catlin: We have another important step as far as the prime is concerned, that is our little difficulties with the third party defendant. So far in this case they have been on the same side. We now change parts of the fence. I would like to have your Honor's ideas as to how and when we should handle that portion of this matter.

The Court: It may take care of itself. You may not [242] be in any disagreement with Hartford. I realize there are issues to follow, but we will take care of this at this time and pick up the loose ends from there.

We will stand at recess. [243]

[Endorsed]: Filed June 3, 1958.

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[Endorsed]: No. 16052. United States Court of Appeals for the Ninth Circuit. Apache Powder Company, a corporation, Appellant, vs. The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company and Mardian Construction Company, corporations engaged in a joint venture as Ashton-Mardian Company and The Travelers Indemnity Company, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: June 18, 1958.

Docketed: June 18, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

No. 16052

UNITED STATES OF AMERICA, for the Use  
of APACHE POWDER COMPANY, a cor-  
poration, Appellant,

vs.

THE ASHTON COMPANY, INC., CONTRAC-  
TORS AND ENGINEERS, formerly Ashton  
Building Company and MARDIAN CON-  
STRUCTION COMPANY, corporations en-  
gaged in a joint venture as Ashton-Mardian  
Company and THE TRAVELERS INDEM-  
NITY COMPANY, a corporation,  
Appellees.

CONCISE STATEMENT OF POINTS TO  
BE RELIED ON BY APPELLANT ON  
APPEAL

Appellant herein, United States of America, for  
the Use of Apache Powder Company, a corpora-  
tion, intends to rely upon the following points for  
reversal of the judgment of the District Court:

1. The District Court erred in denying plaintiff  
Apache Powder Company's motion, made at the  
close of its case, for an amendment to the Amended  
Complaint to conform to the evidence, alleging that  
oral notice was given to the prime contractor, Ash-  
ton Mardian Company, on March 19, 1957, by  
Apache Powder Company within ninety (90) days

after the last material, prior to January 8, 1957, was furnished by Apache Powder Company on the Ajo job on December 20, 1956, for the reason that such proposed allegation conformed to the evidence, and was material in that such oral notice complies with the requirements of Act of Congress of August 24, 1935, c. 642 §2, 49 Stat. 794, 40 U.S.C.A. §270b(a).

2. The District Court erred in finding that the plaintiff Apache Powder Company did furnish materials to the subcontractor, Pioneer Constructors, from June 13, 1956, to and including the 31st day of October, 1956, at the special instance and request of the defendant Pioneer Constructors of a reasonable value of \$20,900.39, without at the same time finding that the last of the material furnished by plaintiff Apache Powder Company on the aforesaid Ajo radar station job, prior to January 8, 1957, the date when the subcontract of defendant Pioneer Constructors was formally terminated and a new subcontract formally entered into between Ashton-Mardian Company and Construction Materials Company, was on December 20, 1956, such additional findings being material and being required by the undisputed evidence on these points.

3. The District Court erred in finding that defendant Pioneer Constructors ceased the doing of any work on the aforesaid job on October 31, 1956, and Construction Materials Company did perform all work encompassed under the Pioneer Constructors' subcontract done on and after November 1, 1956, without at the same time finding that until January 8, 1957, Pioneer Constructors was held re-

sponsible and liable under its subcontract and bond to the prime contractor by Ashton-Mardian Company, the prime contractor, and that from and including November 1, 1956, to and including January 8, 1957, the work performed by Construction Materials Company on said job was performed under the same management, using the same office, employing substantially the same personnel and equipment, and obtaining its material and supplies from the same suppliers as had Pioneer Constructors prior to November 1, 1956, such additional findings being material and being required by the undisputed evidence on these points.

4. The District Court erred in finding that, on December 4, 1956, in the expectation that the defendant Pioneer Constructors' subcontract and the entry of Construction Materials Company into a subcontract would soon thereafter be formally accomplished, Construction Materials Company caused the plaintiff Apache Powder Company to be notified that all materials thereafter supplied or delivered by plaintiff Apache Powder Company to the aforesaid job were to be billed to Construction Materials Company, without at the same time finding that such notification was given by the person who previously had ordered the material for the Ajo job as an employee of Pioneer Constructors, that such person did not notify Apache Powder Company that he then was an employee of Construction Materials Company, and that such person then voluntarily stated that Construction Materials Company was a division of Pioneer Constructors, such additional



findings being material and being required by the undisputed evidence on these points.

5. The District Court erred in finding that after December 4, 1956, and not later than January 8, 1957, plaintiff Apache Powder Company had knowledge and information which would have led a reasonably prudent person in the same situation to make an investigation of the subcontract situation on the Ajo job and the relation of Pioneer Constructors and Construction Materials Company thereto, for the reason that Pioneer Constructors' subcontract had not been terminated on December 4, 1956, and plaintiff Apache Powder Company had no notice or knowledge until March 19, 1957, that Pioneer Constructors' subcontract had been terminated on January 8, 1957, and such findings are not supported by the evidence and are contrary thereto.

6. The District Court erred in finding that plaintiff Apache Powder Company failed to make any reasonable effort under the circumstances to ascertain the facts regarding the subcontract situation and the relationship of Pioneer Constructors and Construction Materials Company thereto; and that Apache Powder Company did not act with ordinary prudence in protecting its rights as against the prime contractor and its surety, for the reason that such finding is not supported by the evidence and is contrary thereto.

7. The District Court erred in concluding that the written notice given by plaintiff Apache Powder Company to defendant Ashton-Mardian Company

on April 25, 1957, did not comply with the requirements of Act of Congress of August 24, 1935, c. 642 § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a), for the reason that Apache Powder Company had no notice or knowledge until March 19, 1957, of the termination on January 8, 1957, of Pioneer Constructors' subcontract, and said written notice was given within ninety days after Apache Powder Company furnished the last of the material on said Ajo job on March 12, 1957, and said conclusion is not supported by the law and the evidence and is contrary thereto.

8. The District Court erred in concluding that the oral notice given by plaintiff Apache Powder Company to defendant Ashton-Mardian Company on March 19, 1957, given within ninety (90) days from December 20, 1956, on which date plaintiff Apache Powder Company furnished the last of the materials on said Ajo job prior to January 8, 1957, when Pioneer Constructors' subcontract was terminated, did not comply with the requirements of Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a), for the reason that said oral notice did comply with the requirements of said Act of Congress, and said conclusion is not supported by the law and the evidence and is contrary thereto.

9. The District Court erred in concluding that the plaintiff Apache Powder Company is not entitled to judgment against the defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian

Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, or any of them, under the First Count of the Amended Complaint, and that said defendants are entitled to judgment against the plaintiff for their costs of suit, for the reason that such conclusions are not supported by the law and the evidence and are contrary thereto.

10. The District Court erred in ordering, adjudging, and decreeing that defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, have judgment against the plaintiff on the First Count of plaintiff's Amended Complaint, and that plaintiff take nothing by said First Count from said defendants, or any of them, and that said defendants have their costs of suit, for the reason that such judgments are not supported by the law and the evidence and are contrary thereto.

Respectfully submitted,

EVANS, KITCHEL & JENCKES,  
/s/ By ALFRED B. CARR,  
Attorneys for Plaintiff.

Notice of Mailing Attached.

[Endorsed]: Filed June 18, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD MATERIAL  
TO CONSIDERATION OF APPEAL

Appellant herein, United States of America, for the Use of Apache Powder Company, a corporation, hereby designates all of the record which is material to the consideration of the appeal, numbering and setting forth the items in accordance with the Clerk's Certificate of Record on Appeal, dated June 16, 1958, as follows:

1. Complaint.
2. Answer of Defendants The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company and Mardian Construction Company, corporations engaged in Joint Venture as Ashton-Mardian Company.
3. Motion for More Definite Statement by third party defendant, Hartford Accident and Indemnity Company.
4. Plaintiff's Response to Third Party Defendant's Motion for More Definite Statement.
5. Answer of Defendant, Pioneer Constructors, a corporation.
6. Answer of Third Party Defendant to Plaintiff's Complaint.
7. Answer of Defendant, The Travelers Indemnity Company, a corporation.
8. All of the Transcript of Pre-trial Conference, except those portions relating solely to No. Civil 966, the case of Armco Drainage & Metal



Products, Inc., which excepted portions appear on  
Lines 9 to 25, inclusive, page 4.

All of page 5.

Lines 1 to 10, inclusive, page 6.

Line 1, page 7.

All of pages 8, 9, and 10.

Lines 1 to 6, inclusive, page 11.

Lines 8 to 25, inclusive, page 16.

All of pages 17 and 18.

Lines 1 to 9, inclusive, page 19.

Lines 13-25, inclusive, page 26.

Lines 1 to 19, inclusive, page 27.

Lines 25 and 26, page 31.

All of pages 32, 33, and 34.

Lines 1 to 20, inclusive, page 35.

9. Minute entry of January 30, 1958 (pre-trial conference).

10. Minute entry of February 28, 1958 (order granting leave to file amended complaint and for separate trials).

11. First Count of Amended Complaint.

12. Minute entry of March 4, 1958 (proceedings of trial).

13. Minute entry of March 5, 1958 (further proceedings of trial).

14. Minute entry of March 6, 1958 (decision).

15. Proposed Additions to Findings of Fact and Conclusions of Law.

16. Objections to Proposed Additions to Findings of Fact and Conclusions of Law filed by defendants Ashton-Mardian Company and The Travelers Indemnity Company.

17. Minute entry of March 21, 1958 (settling findings of fact and conclusions of law and making additional findings of fact and conclusions of law).

18. Findings of Fact and Conclusions of Law.

19. Judgment.

20. Civil Docket Entry of Judgment of March 21, 1958.

21. Civil Docket Entry of Judgment of April 3, 1958.

22. Minute entry of April 3, 1958, for entry of judgment upon claim made by First Count of Amended Complaint.

23. Notice of Appeal to Court of Appeals from judgment entered March 24, 1958.

24. Plaintiff's Bond for Costs on Appeal relating to appeal from judgment entered March 24, 1958.

25. Plaintiff's Notice of Appeal to Court of Appeals from preliminary judgment entered March 24, 1958, and final judgment entered April 3, 1958.

26. Plaintiff's Bond for Costs on Appeal relating to appeal from preliminary judgment entered March 24, 1958, and final judgment entered April 3, 1958.

27. All of the Transcript of Proceedings, except the testimony relating solely to No. Civil 966, the case of Armco Drainage & Metal Products, Inc., which excepted portions are as follows:

(a) The testimony of William Johnson, appearing on pages 22 to 30, inclusive.

(b) The testimony of Gerald John Sturm, appearing on pages 30 to 42, inclusive, and pages

45 to 50, inclusive. [The testimony of Gerald John Sturm appearing on pages 43 and 44 is to be included.]

(c) The testimony of W. T. Melder, appearing on pages 96 to 102, inclusive.

28. Designation of Contents of Record on Appeal.

29. Concise Statement of Points to be Relied On by Appellant on Appeal.

Dated June 23, 1958.

EVANS, KITCHEL & JENCKES,  
/s/ By ALFRED B. CARR,  
Attorneys for Appellant.

Notice of Mailing Attached.

[Endorsed]: Filed June 25, 1958. Paul P. O'Brien, Clerk.